DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-5201
Title: Michael Gary Barber, et al., Petitioners
v.
J. E. Thomas, Warden
Docketed: July 9, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-35940, 08-35945)
Decision Date: April 10, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 8 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 10, 2009)
Jul 16 2009	Waiver of right of respondent J. E. Thomas, Warden to respond filed.
Jul 23 2009	DISTRIBUTED for Conference of September 29, 2009.
Jul 23 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED. (Distributed).
Jul 30 2009	Response Requested . (Due August 31, 2009)
Aug 25 2009	Order extending time to file response to petition to and including September 30, 2009.
Sep 22 2009	Order further extending time to file response to petition to and including October 30, 2009.
Oct 30 2009	Brief of respondent J. E. Thomas, Warden in opposition filed. VIDED.
Nov 6 2009	Reply of petitioners Michael Gary Barber, et al. filed. VIDED.
Nov 10 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 30 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 4 2010	SET FOR ARGUMENT ON Tuesday, March 30, 2010.
Jan 14 2010	Joint appendix filed.
Jan 14 2010	Brief of petitioners Michael Gary Barber, et al. filed.
Jan 21 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Jan 21 2010	Brief amicus curiae of Pierce O'Donnell filed. (Distributed).
Jan 22 2010	CIRCULATED.
Feb 12 2010	The time within which to file respondent's brief on the merits is extended to and including February 18, 2010.
Feb 12 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Feb 18 2010	Brief of respondent J. E. Thomas, Warden filed. (Distributed)
Mar 15 2010	Reply of petitioners Michael Gary Barber, et al. filed. (Distributed)
Mar 30 2010	Argued. For petitioners: Stephen R. Sady, Chief Deputy Federal Public Defender, Portland, Ore. For respondent: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BARBER, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

TAHIR JIHAD-BLACK, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioners, Michael Barber and Tahir Jihad-Black, request leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(7). The petitioners were represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

Respectfully submitted this 6th day of July, 2009.

Stephen R. Sady
Attorney for Petitioners

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BARBER, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

TAHIR JIHAD-BLACK, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal good time credit (GTC) statute provides for credits "up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. However, the Bureau of Prisons (BOP) interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The first question presented is:

> Does "term of imprisonment" in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed?

The Circuits, using a variety of rationales, have rejected the BOP's claim that the statute was unambiguous, but deferred to the BOP interpretation under *Chevron* based on "term of imprisonment" being ambiguous. In this litigation, the BOP has conceded that the regulation implementing the GTC statute, and previously accorded deference, was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule under *Skidmore*. The second question presented is:

> If "term of imprisonment" in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

TABLE OF CONTENTS

Page

Table of Authorities iv

1. Opinions Below 1

2. Jurisdictional Statement 2

3. Statutory Provisions 2

4. Statement Of The Case 4

History Of The Good Time Credit Statute And Its Implementation 5

Background Of Good Time Credit Litigation 7

The Present Litigation 9

5. Reasons For Granting A Writ Of Certiorari 11

A. The Question Is Of Exceptional Importance Because Only This Court Can Resolve The Nation-Wide Question. And Further Delay In Deciding The Issue Is Extremely Prejudicial In Wasted Taxpayer Money And Human Freedom 12

B. The Statute Unambiguously Requires A Maximum Of 54 Days Good Time Credit Against The Term Of Imprisonment Imposed By The Sentencing Judge Under Controlling Rules Of Statutory Construction 15

1. The Ordinary And Natural Meaning Of "Term of Imprisonment" Is The Sentence Imposed 16

2. The Statutory Context, Especially The Rule Of Intra-Statutory Consistency, Establishes That "Term Of Imprisonment" Means The Sentence Imposed 17

3. The History Of Good Time Statutes And The Legislative History Of § 3624(b) Establish That "Term Of Imprisonment" Means The Sentence Imposed 19

C. If The Statute Were Ambiguous, The BOP's Interpretation Is Not Entitled To Deference – Whether Under *Chevron* Or *Skidmore* – Because The Rule Of Lenity Should Be Applied To Resolve Any Ambiguity In A Penal Statute, And Because Any Deference Should Be To The USSC Interpretation, Not The BOP's 23

1. Any Ambiguity In This Penal Statute Should Be Resolved In Favor Of Lenity 24

2. To The Extent That Any Deference Is Appropriate, The USSC's Construction, As Ratified By Congress, Should Control 27

3. An Agency Interpretation Is Not Entitled To Deference If Based On An Error Of Law 31

D. Once An Agency Interpretation Is Held To Be Invalid Under § 706 Because The Agency Failed To Articulate Any Rationale, The Rule Is Invalid In All Manifestations, Including Those Embodied In A Program Statement 32

6. Conclusion 34

INDEX TO APPENDIX

Ninth Circuit Order summarily affirming denial of habeas relief 1

District Court Order denying habeas corpus relief in *Barber v. Thomas*, CV 08-226-MO dated October 27, 2009 3

District Court Order denying habeas corpus relief in *Jihad-Black v. Thomas*, CV 08-227-MO dated October 27, 2009 13

Tablada v. Thomas, 533 F.3d 800 (9th Cir. 2008) 23

Ninth Circuit Order denying panel and en banc rehearing dated March 20, 2009 39

Relevant provisions of the BOP's Sentence Computation Manual, Program Statement 5880.28 40

Federal sentencing statutes using "term of imprisonment" to mean the sentence imposed 54

Sentencing Guideline using "term of imprisonment" to mean the sentence imposed 57

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Alaska Professional Hunters Association v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) 32

Bailey v. United States,
516 U.S. 137 (1995) 19

Barnhart v. Sigmon Coal Co., Inc.,
534 U.S. 438 (2002) 17

Bell v. United States,
349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955) 24

Bifulco v. United States,
447 U.S. 381 (1980) 24

Brown v. Gardner,
513 U.S. 115 (1994) 17

Central Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 30

Chevron USA, Inc. v. NRDC,
467 U.S. 837 (1984) ..... passim

Christensen v. Harris County,
529 U.S. 576 (2000) 33

Clark v. Martinez,
543 U.S. 371 (2005) 24

Crandon v. United States,
494 U.S. 152 (1990) 25, 26

Dolfi v. Pontesso,
156 F.3d 696 (6th Cir. 1998) 26

Evans v. United States Parole Com'n,
78 F.3d 262 (7th Cir. 1996) 26

Gall v. United States,
128 S. Ct. 586 (2007) 13

General Dynamics Land System, Inc., v. Cline,
540 U.S. 581 (2004) 16

Gonzales v. Oregon,
546 U.S. 243 (2006) 27, 28, 29

Greenlaw v. United States,
128 S. Ct. 2559 (2008) 33

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 16

INS v. St. Cyr,
533 U.S. 289 (2001) 25, 26

Kimbrough v. United States,
128 S. Ct. 558 (2007) 13

Leocal v. Ashcroft,
543 U.S. 1 (2004) 16, 26

Mistretta v. U.S.,
488 U.S. 361 (1989) 5, 27, 29, 30

Moreland v. Federal Bureau of Prisons,
126 S. Ct. 1906 (2006) 8, 9

Moreland v. Federal Bureau of Prisons,
363 F. Supp. 2d 882 (S.D. Tex. 2005), *rev'd*, 431 F.3d
180 (5th Cir. 2005) 8, 17, 18, 19, 23, 27

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 8

Negusie v. Holder,
129 S. Ct. 1159 (2009) 31, 32

O'Donald v. Johns,
402 F.3d 172 (3d Cir. 2005) 8

Pacheco-Camacho v. Hood,
272 F.3d 1266 (9th Cir. 2001) 7, 8, 10, 15, 25, 32

Perez-Olivo v. Chavez,
394 F.3d 45 (1st Cir. 2005) 8, 19

Rita v. United States,
127 S. Ct. 2456 (2007) 13

Sash v. Zenk,
428 F.3d 132 (2d Cir. 2005) 8

Securities and Exchange Commission v. Chenery Corp.,
318 U.S. 80 (1943) 31, 32

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 10, 13, 23, 33

Story v. Rives,
97 F.2d 182 (D.C. Cir. 1938) 20

Sullivan v. Stroop,
496 U.S. 478 (1990) 17

Tablada v. Thomas,
533 F.3d 800 (9th Cir. 2008) 2, 10, 13, 30

Tyler v. Cain,
533 U.S. 656 (2001) 19

United States v. Pate,
321 F.3d 1373 (11th Cir. 2003) 16

United States v. R.L.C.,
503 U.S. 291 (1992) 24

United States v. Santos,
128 S. Ct. 2020 (2008) 24

United States v. Wiltberger,
5 Wheat. 76, 5 L. Ed. 37 (1820) 24

White v. Scibana,
314 F. Supp. 2d 834 (W.D. Wis. 2004), *rev'd*, 390 F.3d 997 (7th Cir. 2004) 8, 18, 20

Williams v. Dewalt,
351 F. Supp. 2d 412 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. 2005) 8, 15, 16, 17, 18, 20

Yi v. Federal Bureau of Prisons,
412 F.3d 526 (4th Cir. 2005) 8

FEDERAL STATUTES AND REGULATIONS

5 U.S.C. § 706 (2006) 10, 12, 30, 32

18 U.S.C. § 710 (1902) (repealed 1944) 19

18 U.S.C. § 3006A(d)(7) 1

18 U.S.C. § 3624 ..... passim

18 U.S.C. § 4161 (repealed 1984) 5

28 U.S.C. § 994 (2006) 5, 27, 30

28 U.S.C. § 1254(1) (2008) 2

28 U.S.C. § 2106 13

28 U.S.C. § 2243 13

42 U.S.C. § 13704(a) (2000) 22

28 C.F.R. § 523.20 (2008) 3, 4, 7

MISCELLANEOUS

131 Cong. Rec. E37-02 (daily ed. Jan. 3, 1985) 21

131 Cong. Rec. E201-04 (daily ed. Jan. 24, 1985) 21

131 Cong. Rec. S4083-03 (daily ed. Apr. 3, 1985) 21

140 Cong. Rec. S12314-01, 12350 (daily ed. Aug. 23, 1994) 22

141 Cong. Rec. S2348-01, 2349 (daily ed. Feb. 9, 1995) 22

Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 853 (1948) 20

Criminal Law And Procedure Technical Amendments Act,
Pub. L. 99-646, 100 Stat. 3592 (1986) 21

H.R. Rep. 99-797 (Aug. 15, 1986), *reprinted in* 1986 U.S.C.C.A.N. 6138 21

H.R. Rep. No. 86-935 (Aug. 18. 1959), *reprinted in* 1959 U.S.C.C.A.N. 2518 20

S. Rep. No. 98-225 (Aug. 4. 1983) *reprinted in* 1984 U.S.C.C.A.N. 3182 21

Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*,
http://www.bop.gov/news/quick.jsp (last visited June 16, 2009) 11

Memorandum from Matthew Rowland, Deputy Assistant Director,
Admin. Office of the U.S. Courts, to Chief Prob. Officers and Chief Pretrial Servs.
Officers (May 6, 2009) 11

Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons
Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the
House Comm. on Appropriations, 110th Cong. (2008): Testimony on Budget Request
for the Fed. Bureau of Prisons in President's Fiscal Year 2009 11

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) 6

U.S.S.G. Ch. 1, Pt. A(1)(3) (2008) 6

No. _____

IN THE SUPREME COURT
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MICHAEL BARBER, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

TAHIR JIHAD-BLACK, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

The petitioners, Michael Barber and Tahir Jihad-Black, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 3, 2008, affirming the denial of habeas corpus relief.

1. Opinions Below

The District Court denied habeas corpus relief to Mr. Barber and Mr. Jihad-Black based on the decision in *Tablada v. Daniels*, CV 06-762 MO, on October 27, 2008

(Appendix 3 & 13). By agreement of the parties, the District Court incorporated by reference the pleadings filed and discovery presented in *Tablada*, and ordered that the Opinion and Order filed in *Tablada* be entered as the Opinion and Order in the petitioners' cases (Appendix 3 & 13).

On December 29, 2008, the Ninth Circuit granted the petitioners' motion to stay the appeals pending disposition in *Tablada* or until March 25, 2009. The Ninth Circuit affirmed the denial of habeas corpus relief in *Tablada v. Thomas* on July 3, 2008, 533 F.3d 800 (9th Cir. 2008), and denied panel and en banc rehearing on March 20, 2009 (Appendix 23 & 39). On April 10, 2009, the Ninth Circuit granted summary affirmance based on *Tablada v. Thomas*, and consolidated the petitioners' cases with *Tablada* for the purposes of filing a petition for writ of certiorari (Appendix 1). The petition for writ of certiorari in *Tablada v. Thomas*, was submitted to this Court on June 16, 2009, under case number 08-11034.

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2008).

3. Statutory Provisions

The federal good time statute states:

(b) Credit toward service of sentence for satisfactory behavior. --

> (1) Subject to paragraph (2), *a prisoner* who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, *may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment*, beginning at the end of the

> first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward the service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.
>
> (2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

18 U.S.C. § 3624(b)(2006)(emphasis added). The BOP regulation implementing this statute states:

> § 523.20 Good conduct time.
>
> (a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, *the Bureau will award 54 days credit* toward service of sentence (good conduct time credit) *for each year served*. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.
>
> (b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

> (c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award
>
> (1) *54 days credit for each year served* (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or
>
> (2) *42 days credit for each year served* (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

28 C.F.R. § 523.20 (2008) (emphasis added). Relevant provisions of the BOP's Sentence Computation Manual, Program Statement 5880.28, are attached (Appendix 40). The federal sentencing statutes using "term of imprisonment" to mean the sentence imposed are collected and attached (Appendix 54); such uses of "term of imprisonment" in the Sentencing Guidelines are set out and attached (Appendix 57).

4. Statement Of The Case

This petition raises a pure question of statutory construction and an alternative question regarding administrative interpretation of the statute. The issues were fully developed below at both the District Court and appellate level. Over the past decade, the issues have been litigated without adequately resolving the underlying questions. This case provides an appropriate vehicle for resolving pressing disputes regarding the computation of federal prison sentences. The practical effect of the statutory interpretation advocated by the petitioners is to prevent the loss of seven days of good time credit (GTC) for every year of the sentence imposed on about 95 percent of federal prisoners.

- **History Of The Good Time Credit Statute And Its Implementation**

For at least a century, federal GTC has been based on the sentence that was imposed, not the time actually served. Prior to the Sentencing Reform Act (SRA)'s effective date, the GTC statute provided for graduated available credits per month depending on the length of the sentence. 18 U.S.C. § 4161 (repealed 1984). In the SRA, Congress intended to simplify the process by enacting 18 U.S.C. § 3624(b), which provided that prisoners serving a term of imprisonment greater than one year "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." Because 54 is almost exactly 15 percent of 365, Congress apparently intended that, for any term of imprisonment greater than a year, prisoners could earn up to 15 percent of the sentence imposed in GTC, leaving minimum actual custody of 85 percent.

The SRA delegated to the United States Sentencing Commission (USSC) the creation of the Sentencing Table, requiring "that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served." 28 U.S.C. § 994(m) (2006). In *Mistretta v. United States*, this Court explicitly referred to § 994(m) and the Sentencing Table in approving Congress's delegation to the USSC of the SRA's administration. 488 U.S. 361, 375, 376 n.10, 379 (1989).

In calibrating the Sentencing Table, the USSC collected large samples of sentences and determined the actual time served as a baseline. The USSC then adjusted for GTC "that would be earned under the guidelines" by adding 15 percent to the baseline so that, with the award of GTC, the actual time served would be 85 percent of the sentence imposed:

> Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. *This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines.* This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) (emphasis added). The USSC incorporated its interpretation of the GTC statute in a 1990 amendment to the introduction to the Guidelines manual: "Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, *less approximately fifteen percent for good behavior*." U.S.S.G. Ch. 1, Pt. A(1)(3) (2008) (App.C amend. 307) (emphasis added).

After the SRA became effective on November 1, 1987, prosecutors, defense attorneys, and judges generally calculated the actual minimum time served by multiplying by .85 the potential term of imprisonment. However, the 85 percent calculation was not accurate: internal documents from the BOP disclosed in discovery in this case indicate that on November 7, 1988, a BOP lawyer, with no supporting reasoning, stated in a memorandum that the statute provided GTC "at a rate of 54 days for each year of time served." This interpretation of the statute – again without any reasoning or rationale – was incorporated in

a program statement in February 1992. Program Statement 5880.28 at 1-45 (Feb. 21, 1992) (Appendix 40). On September 26, 1997, the BOP codified the program statement methodology in a manner that the agency has now conceded violated the APA. 28 C.F.R. § 523.20 (2008).

By counting GTC against time served, rather than the sentence imposed, the BOP eliminated seven days per year of potential GTC. Following an admittedly "arithmetically complicated" formula, the BOP's methodology provided only a maximum of 47 days GTC (no more than 12.8 percent) against the sentence imposed (Appendix 40-56). As a result, federal prisoners must serve a minimum of 87.2 percent of the sentence imposed, not 85 percent.

- **Background Of Good Time Credit Litigation**

In previous litigation involving federal GTC, the prisoners simply argued the unambiguous meaning of "term of imprisonment," raising neither the USSC's interpretation of the statute in its establishment of the Sentencing Table, nor the violation of the APA in promulgation of the BOP's rules. In the first case at the Circuit level, the petitioner, who had received a year and a day sentence, argued the statute unambiguously provided 54 days annual credit calculated on the sentence imposed; the BOP argued the statute unambiguously allowed only 47 days. *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1270 (9th Cir. 2001). The Ninth Circuit found that "term of imprisonment" was ambiguous based on the last sentence of the statute providing that GTC may be earned on partial years. *Id.* Then, rather

than apply the rule of lenity to the penal statute, the Court deferred to the BOP's GTC regulation, finding it unnecessary to undertake a "fresh interpretation of the statute." *Id.* at 1271-72.

After *Pacheco-Camacho*, the issue was litigated nationally. Three district courts ruled that § 3624(b) unambiguously required that the BOP provide up to 54 days of GTC against the time imposed by the sentencing judge. *Moreland v. Fed. Bureau of Prisons*, 363 F.Supp.2d 882, 894 (S.D. Tex. 2005), *rev'd*, 431 F.3d 180 (5th Cir. 2005); *Williams v. Dewalt*, 351 F.Supp.2d 412, 420 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. 2005); *White v. Scibana*, 314 F.Supp.2d 834, 841 (W.D. Wis. 2004), *rev'd*, 390 F.3d 997 (7th Cir. 2004). The most detailed analysis was provided in *Moreland*. All three district court opinions provided statutory analyses explaining why *Pacheco-Camacho* was flawed, even without considering the USSC's interpretation or the APA.

Almost every court of appeals rejected the BOP position that the statute unambiguously required only 47 days against the term of imprisonment imposed.[1] However, the courts generally found the statute to be ambiguous and deferred to the BOP's construction. The previous round of statutory litigation ended with a call from Justice Stevens for further examination of federal GTC issues:

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[1] *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005); *Mujahid v. Daniels*, 413 F.3d 991, 999 (9th Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 532-33 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 173-74 (3d Cir. 2005); *Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005); *White v. Scibana*, 390 F.3d 997, 1002-03 (7th Cir. 2004).

> As demonstrated by the thoughtful [*Moreland*] opinion, both the text and the history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed. Despite its technical character, the question has sufficient importance to merit further study, not only by judges but by other Government officials as well.

Moreland v. Fed. Bureau of Prisons, 126 S.Ct. 1906, 1907 (2006) (Stevens, J., statement respecting denial of certiorari).

- **The Present Litigation**

Mr. Barber received a sentence to a term of 320 months imprisonment for drug trafficking and weapons possession. The BOP has calculated petitioner's scheduled release as March 29, 2016. The BOP's maximum award of GTC based on time served was 1254 days; with GTC based on the sentence imposed, the maximum available GTC would be 1440 days.

Mr. Jihad-Black was sentenced to a 262-month sentence for being a felon in possession of a firearm. The BOP has calculated the petitioner's scheduled release date as May 21, 2016, based on a maximum award of 1027 of good time credit according to the BOP's formulation. With GTC based on the sentence imposed, the maximum available GTC would be 1179 days.

Mr. Tablada and the petitioners challenged the BOP's interpretation of the good time statute, raising two questions that were not addressed in prior litigation: whether the USSC's prior construction of the statute to provide 54 days against the sentence imposed should control and whether the absence of justification for the BOP's harsher interpretation rendered

the rule invalid under the APA. The parties fully presented and examined the administrative record, which established: 1) the BOP exercised no discretion, wrongly thinking the statute only allowed 12.8 percent GTC; 2) no rationale justified allowance of fewer GTC if the statute were ambiguous; and 3) no notice was provided that a choice was being made to resolve any ambiguity.

Prior to oral argument in the Ninth Circuit in *Tablada*, the BOP conceded that the GTC regulation violated § 706 of the APA and asserted "that any relief in this case should be limited to a procedural correction, allowing the Bureau's long-standing practice governing good conduct sentencing credits to continue until the procedural correction is effected." *Tablada*, 533 F.3d at 805-06. Mr. Tablada responded, asserting that the concession required that relief be granted. *Id.* at 806. Without considering the procedural validity of the program statement under the APA, the lower court upheld the BOP methodology based on *Skidmore* deference, a position not briefed by the parties. *Tablada*, 533 F.3d at 806-07; *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Without mention of the USSC's 1990 amendment stating 15 percent as the available GTC, the court below assumed that USSC silence constituted approval of the BOP's requirement that prisoners serve a minimum of 87.2 percent of the sentence imposed. *Tablada*, 533 F.3d at 809. The court below also found that the implied delegation to the BOP found by *Pacheco-Camacho* trumped the USSC's interpretation. *Id.*

5. Reasons For Granting A Writ Of Certiorari

The correct calculation of federal GTC is a question of unprecedented importance: 95 percent of federal prisoners are affected by the federal good time statute. The USSC's Sentencing Table was calibrated based on minimum time spent in custody of 85 percent of the sentence imposed, not the 87.2 percent required by the BOP. For federal prisoners eligible for GTC, the total time involved is over 36,000 years (195,435 prisoners[2] x 7 days a year x 9.8 average sentence[3] that is more than a year and less than life, divided by 365 days in a year equals 36,731 years). At $25,894 per year for non-capital incarceration expenditures,[4] this amounts to over $951 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners. If prisoners were awarded 54 instead of 47 days per year, the additional beds available would, with no new prison construction, mitigate dangerous overcrowding in prisons that are at 137 percent of capacity.[5] The human costs of this over-incarceration defy quantification.

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[2] Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, http://www.bop.gov/news/quick.jsp (last visited June 16, 2009) (205, 289 total population adjusted by 4.8 percent—the percentage of prisoners serving less than one year or a life sentence).

[3] Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the House Comm. on Appropriations, 110th Cong. (2008): Testimony on Budget Request for the Fed. Bureau of Prisons in President's Fiscal Year 2009, *available at* 2008 WL 715683.

[4] Memorandum from Matthew Rowland, Deputy Assistant Director, Admin. Office of the U.S. Courts, to Chief Prob. Officers and Chief Pretrial Servs. Officers (May 6, 2009).

[5] Lappin Statement, *supra* note 4, at 2.

This issue is also extraordinarily important based on the need to follow the rule of law. The Circuits have failed to follow this Court's instructions on statutory construction and administrative law. Even after the BOP conceded that its regulation violated § 706 of the APA, the Ninth Circuit refused to construe "term of imprisonment" in light of the USSC's construction. The Court should affirm the USSC's statutory construction to establish that "term of imprisonment" unambiguously means the sentence imposed; to bring GTC into conformance with the Sentencing Commission's grid, which was constructed based on the assumption prisoners would receive up to a 15 percent reduction in GTC for good behavior; and to assure the coherence of this Court's precedent on the application of rule of lenity, rather than agency deference, where liberty is at stake.

A. The Question Is Of Exceptional Importance Because Only This Court Can Resolve The Nation-Wide Question, And Further Delay In Deciding The Issue Is Extremely Prejudicial In Wasted Taxpayer Money And Human Freedom.

The time actually served in BOP custody for 95 percent of federal prisoners is an exceptionally important question of federal law that has not been, but should be, settled by this Court. Nearly all prisoners are sentenced under a construct that presumes 15 percent credit for good behavior, yet due to an undetected error in statutory construction, the BOP requires all prisoners eligible for GTC to serve 87.2 percent of the sentence imposed. The BOP failed to consider that the USSC used the 85 percent rule in calibrating the Sentencing

Table upon which virtually every federal sentence is based.[6] The BOP's decision to give a different meaning to "term of imprisonment" in its third use in the first sentence of § 3624(b) results in a 2.2 percent increase of actual custody in almost every sentence – or a loss of seven days of GTC for every year of the sentence imposed.

In according the BOP *Skidmore* deference that the agency had not invoked, the Ninth Circuit claimed that deviating from the status quo "would have an extremely disruptive effect on the BOP's administration of the release of federal prisoners." *Tablada*, 533 F.3d at 808. Similarly, the Circuits addressing the question have been notably unable to articulate consistent legal reasoning, instead relying on agency deference and, in several opinions, the claim that the federal GTC provision is not a penal statute.

Straightforward legal analysis has fallen victim to expedience: the Circuits appear unwilling to undertake the process of splitting the Circuits on an issue of such broad application. On the other hand, this Court, with its national authority, is uniquely positioned to require that the rule of law be followed and to do so in a practical manner. By ruling on a national level, and by providing the reasonable time for implementation permitted by the Court's broad equitable authority,[7] this Court does not operate under the constraints that

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[6] "[D]istrict courts must treat the Guidelines as the 'starting point and the initial benchmark.'" *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (citing *Rita v. United States*, 127 S. Ct. 2456 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007)).

[7] *See* 28 U.S.C. § 2106 (authorizing entry of determinations "as may be just under the circumstances"); 28 U.S.C. § 2243 (authorizing disposition of habeas corpus cases "as law and justice require").

appear to have affected the lower courts in their failure to follow the three District Courts that have found that the statute unambiguously sets the minimum time in actual custody at 85 percent, not the 87.2 percent required by the BOP.

This Court's authority should also be exercised because a decade of prior Circuit cases was based on profound error. In deferring to the agency under *Chevron*, the Circuits assumed the predicates for deference: delegation to the agency; and application of agency expertise. This litigation eliminated those predicates. The prisoner established the express congressional delegation to the USSC and the USSC's previous interpretation of 85 percent GTC against the sentence imposed. He also proved that no agency expertise was exercised: the BOP thought the statute was unambiguous so never made a choice or provided a rationale for allowing less than the available GTC. Only this Court can disentangle the deep errors stemming from the 1988 memo by a BOP lawyer who never considered the plain language of the statute, the previous USSC interpretation, or the reasons that any interpretive discretion should be applied with lenity.

The Court should take this case without delay. The previous litigation did not have the administrative record establishing that the BOP did not intend to resolve a statutory ambiguity and therefore did not warrant deference. The full administrative record has now been developed, and the Ninth Circuit still avoided the statutory construction necessitated by the administrative record, following instead Ninth Circuit precedent that erroneously failed to interpret the statute in the first instance. The chaotic precedent from the Circuits ignores

the USSC's competing interpretation and accords deference to a supposed discretionary decision the agency admits it viewed – erroneously – as mandated by statute. Only this Court can resolve what should be a simple question of statutory construction free from an irrational and unlawful bias in favor of the status quo.

B. The Statute Unambiguously Requires A Maximum Of 54 Days Good Time Credit Against The Term Of Imprisonment Imposed By The Sentencing Judge Under Controlling Rules Of Statutory Construction.

The exceptionally important question of the construction of the federal GTC statute has been resolved by the lower courts in a way that conflicts with relevant decisions of this Court regarding construction of statutes. The statutory text unambiguously credits good time against the sentence imposed:

> [A] prisoner who is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's *term of imprisonment*, beginning at the end of the first year of the *term*. . . . [C]redit for the last year or portion of a year of the *term of imprisonment* shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1) (emphasis added). Congress used "term of imprisonment" each time to mean the sentence imposed, given the ordinary meaning of the words, the rule of intra-statutory consistency, and the legislative history. The seminal Ninth Circuit case disclaimed undertaking "a fresh interpretation of the statute." *Pacheco-Camacho*, 272 F.3d at 1271; *see Williams*, 351 F. Supp. 2d at 415 (prior cases did not address, or gave only a "cursory nod" to, the rules of statutory construction). This Court requires application of the rules of

construction before deferring to an agency: "[D]eference to [agency] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land System, Inc., v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 943 n.9 (1984)).

1. The Ordinary And Natural Meaning Of "Term of Imprisonment" Is The Sentence Imposed.

Courts should construe statutory language consistently with its natural and ordinary meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). Where the trial judge sentenced Mr. Tablada to "imprisonment for a term" of 20 years, the natural and ordinary meaning of "term of imprisonment" is the judge's sentence of 20 years. Every judgment on the Administrative Office's judgment form refers to the sentence imposed using this language.[8]

Practitioners and courts have long assumed that the 54 days is credited against the sentence imposed. *Williams*, 351 F. Supp. 2d at 419; *see, e.g., United States v. Pate*, 321 F.3d 1373, 1375 n.1 (11th Cir. 2003) ("Actually, he would serve 85% based on the 15% reduction as provided in 18 U.S.C. § 3624(b)(1)."). The common understanding of "term of imprisonment" supports its plain meaning. In fact, in a 2006 publication regarding changes in designation rules, the BOP itself invoked the 15 percent rule in describing how to calculate the number of months until an inmate's release: "Based on the inmate's sentence(s), enter

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[8] Administrative Office Form 245B (Judgment in a Criminal Case), available at http://www.uscourts.gov/forms/ao245.pdf.

the total number of months remaining, less 15% (for sentences over 12 months), and credit for any jail time served." BOP Program Statement 5100.08, Inmate Security Designation & Custody Classification, at Ch. 4, p. 6 (Sept. 12, 2006).

The use of "beyond the time served" in the same sentence of the statute reinforces the ordinary meaning of "term of imprisonment." Congress used "beyond the time served" to indicate how the credit should be awarded, not how much credit is available. "Time served" means actual time in custody, and "term of imprisonment" means the sentence imposed. *Williams*, 351 F. Supp. 2d at 417 ("In drafting § 3624(b), Congress used the phrase 'time served' when it meant time served."). Two different phrases should not have the same meaning in the same sentence. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 454 (2002).

Congress's use of "at the end of each year" further supports the plain meaning. *Moreland*, 363 F. Supp. 2d at 887. The BOP's position that the phrase shows a prisoner must serve a full year is "linguistically unsound, because it incorrectly interprets 'at' to mean 'after.'" *Id.* Normal use of "at" conforms with the interpretation that one year of a "term of imprisonment" consists of 311 days actual time, plus 54 days of good time credit. *Id.*

2. *The Statutory Context, Especially The Rule Of Intra-Statutory Consistency, Establishes That "Term Of Imprisonment" Means The Sentence Imposed.*

The rule of intra-statutory consistency provides that identical words appearing in different parts of the same act are intended to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). This presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, according to

the BOP itself, the first two uses of "term of imprisonment" in the sentence at issue mean the sentence imposed. *White*, 314 F. Supp. 2d at 838. "Term of imprisonment" cannot unambiguously mean the sentence imposed in the first two uses, then suddenly take on a different meaning in the third use:

> The phrase "term of imprisonment" appears three times in the first sentence . . . . On the first two occasions, the phrase undoubtedly means sentence imposed, as several courts have observed . . . . There is no evidence that Congress intended a different meaning the third time around. On the contrary, Congress used the phrase "time served" elsewhere within this same contested sentence, fully demonstrating its drafting ability to distinguish between the two terms when it chose to do so. . . . The Bureau's interpretation not only renders the third instance of the phrase "term of imprisonment" inconsistent with its plain meaning in the two previous appearances, but also transforms its meaning to that of a contrary phrase within the same sentence. Sloppy draftmanship is not difficult to find in the U.S. Code, but the Bureau's interpretation plumbs new depths of linguistic confusion.

Moreland, 363 F. Supp. 2d at 886 (citations and footnote omitted). Deviation from the rule of intra-statutory consistency, applied to the same phrase repeated within a single sentence of a penal statute, appears to be unprecedented.

"Term of imprisonment" is "a legal term of art that Congress had employed in dozens of statutes, many of which were part of the Comprehensive Crime Control Act of 1984, the same act in which § 3624 was included." *White*, 314 F. Supp. 2d at 839. "Throughout these statutes, Congress has uniformly used 'term of imprisonment' as a synonym for 'sentence.'" *Id.*; *see also Williams*, 351 F. Supp. 2d at 417-18 (throughout § 3624 and "throughout the criminal code 'term of imprisonment' is used as a term of art to mean sentence imposed, not time served"). The uses of "term of imprisonment" to uniformly mean the sentence imposed,

in both the federal sentencing statutes and the federal sentencing guidelines, are set out and attached (Appendix 54-61). This statutory context provides definitive meaning to the statutory term. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Bailey v. United States*, 516 U.S. 137, 145 (1995).

Of the many dozens of times the phrase "term of imprisonment" means the sentence imposed, one deviation has been suggested: "term of imprisonment" as meaning time served in 18 U.S.C. § 3624(d). *Perez-Olivo*, 394 F.3d at 49. But close reading of that statute demonstrates that the phrase means the sentence imposed: "[U]pon the release of a prisoner on the expiration of the prisoner's term of imprisonment . . . ." 18 U.S.C. § 3624(d) (2006). The key word is "expiration." The sentence imposed – "term of imprisonment" – expires upon completion of time actually served plus GTC. The uniform use of "term of imprisonment" to mean the sentence imposed demonstrates the term is not ambiguous.

3. The History Of Good Time Statutes And The Legislative History Of § 3624(b) Establish That "Term Of Imprisonment" Means The Sentence Imposed.

If questions remain from the language and context of the statute, the statute's history would resolve any doubt in favor of the 85 percent construction. Congress has always credited good time against the sentence imposed. Between 1902 and 1948, federal good time statutes allowed a well-behaved prisoner to serve less time by receiving credit for good time against "the term of his sentence." 18 U.S.C. § 710 (1902) (repealed 1944); *see also Moreland*, 363 F. Supp. 2d at 887 (discussing legislative history). In fact, computing GTC based on the imposed sentence may have even earlier provenance, since the original statute

became law in 1875. *See Story v. Rives*, 97 F.2d 182, 183-84 & n.1 (D.C. Cir. 1938) (setting forth legislative history). Historically, credit applied against the term of the sentence, not against the time actually spent in prison.

In 1948, Congress adopted new statutory language providing for the first time that the deduction be "credited as earned and computed monthly" to clarify when the credit accrued, not to diminish the amount of the credit. Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 853 (1948). Some courts construed this language "as requiring good time to be computed on the basis of actual time served rather than on the basis of the term of the sentence as imposed by the court." H.R. Rep. No. 86-935 (Aug. 18, 1959), *reprinted in* 1959 U.S.C.C.A.N. 2518, 2519. Thus, the precise problem Mr. Tablada and thousands of prisoners are experiencing first occurred and was corrected almost 50 years ago: "The effect of this interpretation is to require well-behaved prisoners to serve longer periods of confinement than they would under the method of computation which had been used through half a century." *Id.*; *Williams*, 351 F. Supp. 2d at 418.

To solve this problem, Congress, in 1959, deleted the time-served language to restore the methodology of applying good conduct credit to the sentence, not time served. *Id.* Nothing in the legislative history of the present statute indicates an intent to change this approach. "Congress's long history of using an inmate's sentence to calculate good-conduct time supports a conclusion that Congress would have been more explicit if it had intended to adopt a different policy." *White*, 314 F. Supp. 2d at 840.

The current good time statute was part of the SRA. Congress continued the pre-1948 and post-1959 formulation that applied good conduct time to the sentence, eschewing language such as "credited as earned and computed monthly," using instead "term of imprisonment." An earlier draft of the good time statute would have provided up to 36 days of good time credit against the term of imprisonment, "approximately 10 percent." S. Rep. No. 98-225, at 147 (Aug. 4, 1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3330. The final version simply added 5 percent to the maximum available good time credits. 1984 U.S.C.C.A.N. at 3711 (Amendment 130 "increases the 'good time' that accrues from 10 percent to 15 percent.").[9]

Shortly after the passage of the bill, members of Congress characterized it as granting a 15 percent reduction from the defendant's "sentence," not based on the time served. *See, e.g.*, 131 Cong. Rec. S4083-03 (daily ed. Apr. 3, 1985) (statement of Sen. Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'"); 131 Cong. Rec. E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); 131 Cong. Rec. E201-04 (daily ed. Jan. 24,

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[9] Shortly before the statute's effective date, Congress enacted a technical amendment to § 3624(b) "to clarify that the good time credit can be earned for the first year of a term of imprisonment." Criminal Law And Procedure Technical Amendments Act, Pub. L. 99-646, 100 Stat. 3592 (1986); H.R. Rep. 99-797 at 21 (Aug. 15, 1986), *reprinted in* 1986 U.S.C.C.A.N. 6138, 6144.

1985) (statement of Rep. Mazzoli) ("[A] sentence could be shortened 15 percent for good behavior.").

When Congress considered encouraging States to adopt the federal approach to GTC, § 3624(b)'s coauthor articulated the express intent to provide federal prisoners with up to 15 percent GTC against the sentence imposed. Then-Senator Joseph Biden stated:

> I was the coauthor of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time - 8.5 years, which is what the law mandates. *You can get up to 1.5 years in good time credits, but that is all.* And we abolished parole. *So you know you'll be in prison for at least 8.5 years.*

141 Cong. Rec. S2348-01, 2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden) (emphasis added); *see also* 140 Cong. Rec. S12314-01, 12350 (daily ed. Aug. 23, 1994) (statement of Sen. Biden) ("So my Republican friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money *unless they keep their people in jail for 85 percent of the time just like we do at the Federal level* in a law written by yours truly and several others.") (emphasis added).[10]

The simplicity of the 85 percent rule provided part of the rationale for the legislation. Congress expressly referred to the need for change from "the complexity of current law" and the need to award good time credit at an "easily determined rate." 1984 U.S.C.C.A.N. at 3330. Congress believed § 3624(b) to "be considerably less complicated than under current

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[10] The statute to which then-Senator Biden was referring required, in five different places, that the States demonstrate that state prisoners "serve not less than 85% of the sentence imposed" as a condition of federal assistance. 42 U.S.C. § 13704(a) (2000).

law in many respects." 1984 U.S.C.C.A.N. at 3329. The 85 percent system best serves this purpose because it is as easy to calculate 15 percent of a sentence as it is to calculate a 15 percent tip. On the other hand, the BOP program statement "which implements the 'time served' policy, is well-over 200 pages long, contains cumbersome and confusing formulas that even the Bureau describes as 'arithmetically complicated,' and which few, if any, prisoners could ever be expected to decipher." *Moreland*, 363 F. Supp. 2d at 888-89.

C. If The Statute Were Ambiguous, The BOP's Interpretation Is Not Entitled To Deference – Whether Under *Chevron* Or *Skidmore* – Because The Rule Of Lenity Should Be Applied To Resolve Any Ambiguity In A Penal Statute, And Because Any Deference Should Be To The USSC Interpretation, Not The BOP's.

If the phrase "term of imprisonment" were ambiguous, the interpretation allowing seven additional days of GTC would still be required by this Court's governing precedent. First, § 3624(b) is a penal statute to which the rule of lenity applies: the statute is codified in Title 18 – Crimes and Criminal Procedure – in the chapter entitled Post-Sentence Administration, and determines the length of actual incarceration. Second, any available deference should be accorded to the USSC, to which Congress delegated administration of the SRA, including the Sentencing Table based on assumed 15 percent available GTC. Third, no deference is appropriate under *Skidmore* or *Chevron* where the agency made a legal error and did not purport to make a policy choice.

1. Any Ambiguity In This Penal Statute Should Be Resolved In Favor Of Lenity.

This Court applies the "venerable" rule of lenity "to answer questions about the severity of sentencing" under the SRA. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *see Bifulco v. United States*, 447 U.S. 381, 387 (1980) (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."). The lower court failed to conduct an independent review of the statute, which would have required application of the rule of lenity to resolve any lingering ambiguities and, instead, adopted prior rulings deferring to the agency's interpretation. Deference to agency interpretations is misplaced in the criminal context.

By applying the rule of lenity, the Court rightly "places the weight of inertia upon the party" – the government – "that can best induce Congress to speak more clearly," prevents the courts from having to "play the part of a mind reader," and follows a requirement federal courts have applied for roughly two centuries:

> In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 5 Wheat. 76, 105, 5 L.Ed. 37 (1820). And Justice Frankfurter, writing for the Court in another case, said the following: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

United States v. Santos, 128 S.Ct. 2020, 2026 (2008). *Accord Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Instead of following this fundamental rule of construction, the Ninth Circuit, in the initial case that has been followed by other Circuits, put the cart before the

horse, deferring to the agency first, rather than applying the rule of lenity, thereby allowing an Executive Branch agency to decide the meaning of "term of imprisonment." *Pacheco-Camacho*, 272 F.3d at 1271.

The lower courts profoundly erred – and violated this Court's precedent going back to *Chevron* – in deferring to the agency before adequately interpreting the statute. In *INS v. St. Cyr*, the Court rejected application of *Chevron* deference unless the statutes, after "applying the normal 'tools of statutory construction,' are ambiguous." 533 U.S. 289, 320 n.45 (2001). In rejecting retroactive application of an immigration statute, the Court stated: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective. . . . there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id.* As with the doctrine against retroactivity, the rule of lenity is a "tool of statutory construction" that renders the penal statute unambiguous for *Chevron* purposes.

Well before *St. Cyr*, this Court identified the constitutional perils of deferring to an Executive Branch interpretation of a penal statute. In *Crandon v. United States*, 494 U.S. 152 (1990), the Court rejected the Executive Branch's construction of a penal statute and, relying in part on the rule of lenity, concluded that the statute did not extend as construed by the agency. In a concurring opinion, Justice Scalia, joined by Justices O'Connor and Kennedy, drew a clear line between the roles of the Executive Branch and the Judicial Branch in interpreting criminal statutes: deference to Executive Branch interpretation of

penal statutes "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

The Court followed *St. Cyr* and *Crandon*'s reasoning in *Leocal v. Ashcroft*, in which the immigration agency found an alien removable for having committed an aggravated felony. 543 U.S. 1 (2004). In holding that drunk driving is not a "crime of violence," and thus not an aggravated felony, the Court utilized the rule of lenity rather than the agency's interpretation of the statute. *Id.* at 12. Applied to the present case, *Leocal* requires an interpretation of the good time statute to require the 15 percent rule, rather than the BOP's harsher interpretation that only allows 12.8 percent GTC against the sentence imposed.

The Ninth Circuit's "deference first" approach conflicts with opinions from the Sixth and Seventh Circuits. The Sixth Circuit declined to defer to the Parole Commission's interpretation of a statute, stating: "Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases . . . . The rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (citations omitted). "Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts." *Id.*; *see also Evans v. United States Parole Com'n*, 78 F.3d 262, 265 (7th Cir. 1996) ("[W]e have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of

imprisonment: certainly judges do not defer to the Attorney General's interpretation of Title 18.").

"To the extent there remains any ambiguity in the statute after considering its most natural linguistic meaning and the legislative history, the rule of lenity eliminates all doubt: good conduct time must be based on the sentence imposed, rather than time served." *Moreland*, 363 F. Supp. 2d at 890.

2. *To The Extent That Any Deference Is Appropriate, The USSC's Construction, As Ratified By Congress, Should Control.*

The lower courts in the prior litigation did not address the deference that should be accorded to the USSC's interpretation of the statute. With the question squarely before the Court, this Court's precedent requires that the USSC construction control if "term of imprisonment" is ambiguous. The legitimacy of agency action depends on statutory delegation of authority. *Gonzales v. Oregon*, 546 U.S. 243, 255-58 (2006). As approved in *Mistretta*, Congress explicitly delegated to the USSC the administration of the SRA, of which § 3624(b) is a part.

Prior to the SRA's effective date, the USSC acted on this delegation in calibrating the Sentencing Table, and, in 1990, reiterated the 85 percent interpretation in amending the Guideline Manual. In rejecting the constitutional challenges to the SRA, this Court in *Mistretta* expressly recognized and approved of Congress's delegation to the USSC of the duty to implement the new sentencing laws. In 28 U.S.C. § 994(m), this delegation to the USSC explicitly included the setting of initial guidelines based on "the length of such terms

actually served." This in turn required the USSC to set the Sentencing Table based on actual time served plus the maximum GTC, which necessarily required interpretation of § 3624(b). Thus, the USSC acted within the express and explicit authority of Congress when it set the initial guidelines using a Sentencing Table based on 15 percent of the sentence imposed in GTC.

Under this Court's binding authority, Congress delegated any available discretion regarding interpretation of the amount of available GTC to the USSC, and its interpretation, not the BOP's, should control. Deference under *Chevron* is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority:

> *Chevron* deference, however is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.

Gonzales, 546 U.S. at 258 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Any available deference should be accorded to the USSC's interpretation of the SRA: Congress only allowed the BOP to determine whether a prisoner should receive such credits, not how much GTC was available. Further, the USSC, unlike the BOP, is not an executive agency, so deferring to the USSC avoids the constitutional problems surrounding executive rather than legislative determination of the maximum actual incarceration a prisoner can receive for a term of imprisonment.

The USSC, both in its published description of how it constructed the Sentencing Table and in the Guidelines Manual commentary, expressly interpreted the GTC statute to provide a minimum of 85 percent service of the term of imprisonment imposed. Under *Mistretta*, the Sentencing Commission acted within the express authority provided by Congress. Under *Gonzalez* and *Mead*, the proper scope of agency activity is dictated by Congress's statutory direction. Therefore, in the present case, Congress delegated the construction of § 3624(b)'s maximum GTC only to the expertise of the USSC.

In contrast to the express delegation to the USSC, the BOP has no statutory authorization to set the maximum amount of available GTC. Although Congress entrusted the BOP with the duty to determine whether a prisoner earns GTC based on behavior while in BOP custody, and how to resolve conflicts regarding the forfeiture of GTC, Congress did not delegate to the BOP the power to set the maximum available GTC. The BOP cannot point to any statute granting such discretion. *See Gonzales*, 546 U.S. at 267 (Congress does not delegate in vague or ancillary terms).

The BOP did not even presume to make an administrative construction of the statute: the BOP's position has been that it had no choice but to require service of 87.2 percent of the sentence imposed. The agency believed the statute unambiguously required that the 54 days be calculated against "time served," not the sentence imposed. Rather than congressional delegation of authority to interpret the statute, the BOP simply – and incorrectly – thought it was implementing the unambiguous terms of the statute.

The Ninth Circuit erred as a matter of law in assuming the USSC consented to the BOP's later interpretation of the statute. *Tablada*, 533 F.3d at 809. First, the Ninth Circuit ignored that Congress explicitly approved of the USSC's adoption of 15 percent as the available GTC. By adopting the Sentencing Table and, later, the 1990 amendment, Congress agreed to the 85 percent interpretation under 28 U.S.C. § 994(p) (2006). Under the SRA, the USSC cannot consent by silence to an amendment: the only way the 15 percent language can be changed is by formal amendment, which must be preceded by notice to the relevant parties. 28 U.S.C. § 994(o) (2006). The BOP – although specifically named in § 994(o) – took no action to amend the 85 percent rule.

Second, this Court disapproves imputing legislative intent based on silence. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994). The use of silence is especially inappropriate where the BOP provided no notice it was deviating from the USSC's interpretation. For the same reason the regulation violated § 706 of the APA, the notices of the BOP regulation provided no basis to infer the USSC's intent to accede to any BOP interpretation.

Third, because this Court recognized in *Mistretta* that Congress explicitly delegated to the USSC the implementation of the SRA, the USSC had no reason to believe the BOP could or would arrogate that function to itself. The USSC never received notice that the BOP was construing an ambiguous statute because the BOP never purported to be interpreting the

statute. The "implied delegation" approved by the Ninth Circuit is trumped by this Court's explicit recognition that Congress delegated administration of the SRA to the USSC.

3. An Agency Interpretation Is Not Entitled To Deference If Based On An Error Of Law.

In earlier litigation, the Circuits determined that "term of imprisoment" was ambiguous and upheld the BOP's regulation as entitled to *Chevron* deference. In the present litigation, the petitioner's discovery established that the BOP never exercised its discretion, but rather acted based on an error of statutory interpretation. Indeed, the BOP did not recognize that there was any ambiguity requiring interpretation. Yet, instead of invalidating the improperly promulgated rules, the Ninth Circuit recapitulated the error this Court identified in *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943).

There, the SEC had adjudicated a case, imposing a requirement on a corporation because the SEC believed the law required it, and the corporation appealed that decision alleging the agency action was invalid. This Court held that the agency's determination as to what the law required was incorrect, and, even though there might be grounds upon which the agency could have reached the same outcome, the courts could not provide that justification for the agency. It was the responsibility of the agency to articulate the rationale for its decision at the time of its decision, not just in arguments to the court.

Similarly, this Court declined to defer to an agency's understanding of a statute based on the agency's error of law in *Negusie v. Holder*, 129 S.Ct. 1159, 166 (2009). In *Negusie*, the immigration agency erroneously believed a statute categorically barred asylum to anyone

who was compelled to assist in persecution. This Court undertook an independent interpretation of the statute and deemed it ambiguous. *Negusie*, 129 S.Ct. at 1165. The Court did not defer to the agency's interpretation because the agency had not exercised its *Chevron* discretion to interpret the statute in question. *Negusie*, 129 S.Ct. at 1167.

Here, as in *Chenery* and *Negusie*, the agency's interpretation of the law was incorrect. As a consequence, the agency never made a choice between available interpretations. Whether or not the agency could adopt a valid rule in the future on the basis of its experience and expertise, it has not done so to date. The Ninth Circuit erroneously usurped the agency's role and provided its own justification for the agency action based on the erroneous assumptions of *Pacheco-Camacho*. Even if "term of imprisonment" were ambiguous, the BOP's error of law forecloses judicial ratification of unlawful agency action.

D. Once An Agency Interpretation Is Held To Be Invalid Under § 706 Because The Agency Failed To Articulate Any Rationale, The Rule Is Invalid In All Manifestations, Including Those Embodied In A Program Statement.

The Court should also grant certiorari to address the Ninth Circuit's administrative law ruling regarding the continued viability of an agency's interpretation of a statute following the finding of a § 706 violation. The Ninth Circuit, after the BOP's concession that its GTC regulation violated the APA, upheld the BOP's GTC rules based on deference. The program statements suffer the same procedural invalidity as the regulation because, as "agency action" affecting rights of a class of persons and deviating from historical practice, the rule is legislative in effect, regardless of label. *Alaska Professional Hunters Ass'n v.*

FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

The BOP never argued for *Skidmore* deference to its program statement, presumably because it recognized that the program statement suffered the same infirmity as its regulation.[11] Even under the *Skidmore* methodology, none of the factors favor deference:

- "thoroughness evident in consideration" – the BOP never considered the USSC's 85 percent rule;
- "validity of its reasoning" – BOP provided no reasoning;
- "consistency with earlier pronouncements" – the BOP's methodology is inconsistent with historical practice and the prior USSC interpretation; and
- "power to persuade" – the BOP has never proffered any argument as to why, if there is a choice, the harsher option is appropriate.

The *Skidmore* task is statutory interpretation, not ratification of unlawful agency action that persists for a long enough time.

This Court provides the only effective judicial review of a sentencing statute that is being unlawfully implemented at enormous human and fiscal costs. This Court's precedent forecloses the Ninth Circuit's application of *Skidmore* deference. The institutionalized over-

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[11] In constructing a remedy based on a theory not argued by the parties, the Ninth Circuit acted inconsistently with the party presentation principle. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

incarceration of federal prisoners by 2.2 percent should compel this Court's immediate attention to address a question that will have an unprecedented effect on human freedom – and the public fisc.

6. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 6th day of July, 2009.

Stephen R. Sady
Attorney for Petitioners

APPENDIX

FILED

APR 10 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISMAEL TABLADA, Petitioner - Appellant, v. J.E. THOMAS, Warden, FCI Sheridan, Respondent - Appellee.	No. 07-35538 D.C. No. CV-06-00762-MWM District of Oregon, Portland
TAHIR ABDUL JIHAD-BLACK, Petitioner - Appellant, v. J.E. THOMAS, Warden, FCI Sheridan, Respondent - Appellee.	No. 08-35940 D.C. No. 3:08-cv-00227-MO District of Oregon, Portland
MICHAEL GARY BARBER, Petitioner - Appellant, v. J.E. THOMAS, Warden, FCI Sheridan, Respondent - Appellee.	No. 08-35945 D.C. No. 3:08-cv-00226-MO District of Oregon, Portland ORDER

Before: LEAVY, GRABER and BEA, Circuit Judges.

g/MOATT

The Clerk shall amend the docket to substitute J.E. Thomas, Warden, as the proper appellee in these appeals. *See* Fed. R. App. P. 43(c)(2).

Appellants' unopposed motions for summary affirmance of appeal Nos. 08-35940 and 08-35945 are granted. The district court's judgments in those actions are summarily affirmed. The mandate shall issue forthwith in these appeals.

Appellants' motions to consolidate appeal Nos. 08-35940 and 08-35945 with appeal No. 07-35538 for purposes of filing a petition for writ of certiorari with the United States Supreme Court are granted.

AFFIRMED.

FILED'08 OCT 27 13:35USDC-ORP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHAEL BARBER, **Civ. No. 08-226 MO**

Petitioner, **ORDER**

vs.

J. E. THOMAS,
Warden, FCI Sheridan,

Respondent.

Upon agreement of the parties, the Court makes the following findings

The Court finds that the petition for writ of habeas corpus filed on February 22, 2008, raises the same issues raised in *Tablada v. Daniels*, CV 06-762 MO, petition for rehearing pending in *Tablada v. Thomas*, CA 07-35538.

The Court further finds that the parties are in agreement that the resolution of *Tablada* will be dispositive to the disposition of this case at the district court level even though there have been procedural changes in the *Tablada* case that do not materially affect the parties original agreement as to the disposition of this case;

The Court further finds that the parties are in agreement that the pleadings, including discovery, filed in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated by reference and should constitute the record in this case;

The Court further finds that the parties are in agreement that the Order and Opinion in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated as the Order and Opinion in this case;

THEREFORE, the Court orders that the record in this case shall incorporate by reference the pleadings filed in *Tablada v. Daniels*, CV 06-762 MO, and shall include all discovery presented in that case;

The Court further orders that the Opinion and Order filed in *Tablada v. Daniels*, CV 06-762 MO, shall be entered in this case as the Opinion and Order.

IT IS SO ORDERED this 27 day of October, 2008.

Michael W. Mosman
District Court Judge

Presented by:

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

/s/ Scott Asphaug
Scott Asphaug
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ISMAEL TABLADA,	)	
	)	Civil No. 06-762-MO
Petitioner,	)	
	)	
v.	)	
	)	
CHARLES DANIELS,	)	
	)	OPINION AND ORDER
Respondent.	)	

Stephen R. Sady
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
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Assistant United States Attorney
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

Attorneys for Respondent

///

MOSMAN, District Judge.

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2241 in which he challenges the Bureau of Prisons' method for calculating good conduct time ("GCT") toward the service of his federal sentence. For the reasons set forth below, the Amended Petition for Writ of Habeas Corpus (#21) is denied.

BACKGROUND

On December 17, 1990, petitioner was convicted in the District of Minnesota of a narcotics offense in violation of 18 U.S.C. § 846. Petitioner currently has a GCT projected release date of April 16, 2008 at which time he will be subject to deportation.

Petitioner filed this habeas corpus action challenging the method utilized by the Bureau of Prisons ("BOP") to calculate his GCT. Petitioner argues that GCT should be derived from the length of the sentence imposed, not the time an inmate actually serves in prison. Specifically, petitioner raises the following grounds for relief:

1. The BOP's decision to award petitioner GCT on a time served basis violates the Administrative Procedures Act, 5 U.S.C. §§ 553 and 706; and

2. The BOP's decision to apply its interpretation of 18 U.S.C. § 3624(b) to petitioner's case violates the *Ex Post Facto* Clause.

Petitioner therefore asks the court to invalidate the method the BOP currently uses to calculate GCT, and order respondent to recalculate his sentence accordingly.

DISCUSSION

I. Application of the Administrative Procedures Act ("APA").

The statute governing the allocation of good time credits to federal prisoners provides, in relevant part, the following:

> [A] prisoner who is serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

18 U.S.C. § 3624(b)(1).

The BOP's implementing regulation provides as follows:

> Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 523.20.

Petitioner argues that 28 C.F.R. § 523.20 was not promulgated through the notice-and-comment requirements of § 553 of the APA, and is therefore invalid. Section 553 of the APA requires that an agency: (1) publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's effective date; and (2) provide the public with an opportunity to comment on the rule.

The BOP published 28 C.F.R. § 523.20 for comment in 1997 as an interim rule. 62 Fed. Reg. 50786-01, 50786-87 (Sept. 26, 1997).

No public comments were submitted, and in 2003 the BOP published a change (pertaining to inmate literacy) to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01, 37776-77 (June 25, 2003). 28 C.F.R. § 523.20 became final on December 5, 2005. 70 Fed. Reg. 66752-01, 66752-53 (Nov. 3, 2005). It is therefore clear that the BOP promulgated this regulation through the notice-and-comment procedure. Moreover, the Ninth Circuit has clearly stated that the "BOP regulation in question, 28 C.F.R. § 523.20, was adopted through the notice-and-comment procedure. . . ." Pacheco-Camacho v. Hood, 272 F.3d 1266, 1268 (9th Cir. 2001). Accordingly, petitioner's allegations on this point are without merit.

Petitioner also argues that the court should invalidate the BOP's method of calculating GCT under § 706(2)(A) of the APA which provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." Petitioner's argument is based on his assertion that the U.S. Sentencing Commission, not the BOP, was vested with the authority to implement the Sentencing Reform Act of 1984, and that the BOP failed to consider the Sentencing Commission's alternative interpretation of § 3624(b)(1) when promulgating 28 C.F.R. § 523.20. Consequently, petitioner concludes that the regulation is unreasonable and irrational.

Assuming that 18 U.S.C. § 3625 does not preclude consideration of this issue,[1] the Ninth Circuit clearly found that § 3624(b)(1) is ambiguous, and that "[t]he BOP regulation that adopts the term served rather than the sentence imposed as the basis for the proration . . . falls within the implied statutory authority of the BOP." Pacheco-Camacho v. Hood, 272 F.3d 1266, 1270 (9th Cir. 2001). Not only did the Pacheco-Camacho court find that the BOP had the statutory authority to promulgate 28 C.F.R. 523.20, it also concluded that the BOP's interpretation of § 3624(b)(1) is reasonable and considered the "sentence imposed" calculation proposed by the petitioner to be "inconsistent with the statute . . . ." Id at 1268. The Ninth Circuit revisited the issue again in Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005), and reiterated that the BOP's interpretation of § 3624(b)(1) was reasonable. Id at 995-999.

Petitioner asserts that Pacheco-Camacho and Mujahid are unconstitutional rulings and violate the basic rules of statutory construction. Petitioner is unable to cite to any Supreme Court or

---

[1] 18 U.S.C. § 3625 provides that various sections of the APA, including § 706, do not apply "to the making of any determination, decision, or order under this subchapter." The statute underlying the current action, 18 U.S.C. § 3624(b), is included in the "subchapter" identified in § 3625. See Krilich v. Federal Bureau of Prisons, 346 F.3d 157, 159 n. 2 (6th Cir. 2003) (§ 3625 applies to 18 U.S.C. §§ 3621, et seq.). Because it is unclear whether the promulgation of a rule constitutes a "determination, decision, or order" under § 3625, the court resolves this claim on the merits.

en banc Ninth Circuit decision invalidating Pacheco-Camacho or Mujahid. Instead, he cites a comment by Supreme Court Justice John Paul Stevens made during the Court's denial of certiorari pertaining to a Fifth Circuit case. Justice Stephens stated that the calculation of GCT "has sufficient importance to merit further study, not only by judges but by other Government officials as well." Moreland v. Federal Bureau of Prisons, 126 S.Ct. 1906 (2006) (Stevens, J., statement respecting denial of certiorari). This statement is insufficient to cast doubt on the vitality of Pacheco Camacho and Mujahid.

Even if this court were not bound by Ninth Circuit precedent, a variety of other circuit courts have determined that the BOP's method for calculating GCT is reasonable. See Brown v. McFadden, 416 F.3d 1271, 1273 (11th Cir. 2005); Yi v. Federal Bureau of Prisons, 412 F.3d 526, 534 (4th Cir. 2005); Perez-Olivio v. Chavez, 394 F.3d 45, 53 (1st Cir. 2005); O'Donald v. Johns, 402 F.3d 172, 174 (3d Cir. 2005); Bernitt v. Martinez, 432 F.3d 868, 869 (8th Cir. 2005); White v. Schibana, 390 F.3d 997, 1002-03 (7th Cir. 2004). In light of the binding precedent of this Circuit, as well as the opinions of numerous other circuits holding that the BOP's method for calculating GCT is reasonable, the court cannot conclude that the BOP's method is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

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II. ***Ex Post Facto* Challenge**.

Petitioner also asserts that the current calculation of his GCT violates the *Ex Post Facto* Clause because 28 C.F.R. § 523.20 had not been implemented at the time he committed his crime in 1990. He argues that at the time of his offense, only the Sentencing Commission's "sentence imposed" interpretation of § 3624(b) was in existence, and that interpretation was more favorable to him than the "time served" interpretation the BOP currently applies. He therefore contends that he had a settled expectation regarding the calculation of his GCT based on the Sentencing Commission's interpretation.

The *Ex Post Facto* Clause of the U.S. Constitution prohibits the enactment of laws which, by retroactive operation, increase the punishment for a crime after its commission. Garner v. Jones, 529 U.S. 244, 250 (2000). A law violates the *Ex Post Facto* Clause if: (1) it "appl[ies] to events occurring before its enactment," Weaver v. Graham, 450 U.S. 24, 29 (1981); and "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." Calif. Dep't. of Corr. v. Morales, 514 U.S. 499, 504 (1995).

While 28 C.F.R. § 523.20 was not formally implemented until 1997, the BOP has consistently calculated GCT using the time served methodology since the adoption of the Comprehensive Crime Control Act of 1984. See Declaration of Scott Erik Asphaug, p. 2. Because

the BOP has consistently calculated GCT based on a prisoner's time served, and since this practice predates petitioner's underlying crime, petitioner did not have a settled expectation in an alternative interpretation and was not disadvantaged by the enactment of 28 C.F.R. § 523.20. Accordingly, there is no ex post facto violation.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#21) is DENIED, and this case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 11th day of May, 2007.

/s/Michael W. Mosman
Michael W. Mosman
United States District Judge

FILED'08 OCT 27 13:35USDC-ORP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TAHIR JIHAD-BLACK, **Civ. No. 08-227 MO**

Petitioner, **ORDER**

vs.

J. E. THOMAS, Warden, FCI Sheridan,

Respondent.

Upon agreement of the parties, the Court makes the following findings

The Court finds that the petition for writ of habeas corpus filed on February 22, 2008, raises the same issues raised in *Tablada v. Daniels*, CV 06-762 MO, petition for rehearing pending in *Tablada v. Thomas*, CA 07-35538.

The Court further finds that the parties are in agreement that the resolution of *Tablada* will be dispositive to the disposition of this case at the district court level even though there have been procedural changes in the *Tablada* case that do not materially affect the parties original agreement as to the disposition of this case;

The Court further finds that the parties are in agreement that the pleadings, including discovery, filed in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated by reference and should constitute the record in this case;

The Court further finds that the parties are in agreement that the Order and Opinion in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated as the Order and Opinion in this case;

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The Court further orders that the Opinion and Order filed in *Tablada v. Daniels*, CV 06-762 MO, shall be entered in this case as the Opinion and Order.

IT IS SO ORDERED this 27 day of October, 2008.

Michael W. Mosman
District Court Judge

Presented by:

/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

/s/ Scott Asphaug
Scott Asphaug
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ISMAEL TABLADA,	)	
	)	Civil No. 06-762-MO
Petitioner,	)	
	)	
v.	)	
	)	
CHARLES DANIELS,	)	
	)	OPINION AND ORDER
Respondent.	)	

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Attorneys for Respondent

///

MOSKAN, District Judge.

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2241 in which he challenges the Bureau of Prisons' method for calculating good conduct time ("GCT") toward the service of his federal sentence. For the reasons set forth below, the Amended Petition for Writ of Habeas Corpus (#21) is denied.

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On December 17, 1990, petitioner was convicted in the District of Minnesota of a narcotics offense in violation of 18 U.S.C. § 846. Petitioner currently has a GCT projected release date of April 16, 2008 at which time he will be subject to deportation.

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1. The BOP's decision to award petitioner GCT on a time served basis violates the Administrative Procedures Act, 5 U.S.C. §§ 533 and 706; and

2. The BOP's decision to apply its interpretation of 18 U.S.C. § 3624(b) to petitioner's case violates the *Ex Post Facto* Clause.

Petitioner therefore asks the court to invalidate the method the BOP currently uses to calculate GCT, and order respondent to recalculate his sentence accordingly.

DISCUSSION

I. Application of the Administrative Procedures Act ("APA").

The statute governing the allocation of good time credits to federal prisoners provides, in relevant part, the following:

> [A] prisoner who is serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

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28 C.F.R. § 523.20.

Petitioner argues that 28 C.F.R. § 523.20 was not promulgated through the notice-and-comment requirements of § 553 of the APA, and is therefore invalid. Section 553 of the APA requires that an agency: (1) publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's effective date; and (2) provide the public with an opportunity to comment on the rule.

The BOP published 28 C.F.R. § 523.20 for comment in 1997 as an interim rule. 62 Fed. Reg. 50786-01, 50786-87 (Sept. 26, 1997).

No public comments were submitted, and in 2003 the BOP published a change (pertaining to inmate literacy) to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01, 37776-77 (June 25, 2003). 28 C.F.R. § 523.20 became final on December 5, 2005. 70 Fed. Reg. 66752-01, 66752-53 (Nov. 3, 2005). It is therefore clear that the BOP promulgated this regulation through the notice-and-comment procedure. Moreover, the Ninth Circuit has clearly stated that the "BOP regulation in question, 28 C.F.R. § 523.20, was adopted through the notice-and-comment procedure. . . ." Pacheco-Camacho v. Hood, 272 F.3d 1266, 1268 (9th Cir. 2001). Accordingly, petitioner's allegations on this point are without merit.

Petitioner also argues that the court should invalidate the BOP's method of calculating GCT under § 706(2)(A) of the APA which provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." Petitioner's argument is based on his assertion that the U.S. Sentencing Commission, not the BOP, was vested with the authority to implement the Sentencing Reform Act of 1984, and that the BOP failed to consider the Sentencing Commission's alternative interpretation of § 3624(b)(1) when promulgating 28 C.F.R. § 523.20. Consequently, petitioner concludes that the regulation is unreasonable and irrational.

Assuming that 18 U.S.C. § 3625 does not preclude consideration of this issue,[1] the Ninth Circuit clearly found that § 3624(b)(1) is ambiguous, and that "[t]he BOP regulation that adopts the term served rather than the sentence imposed as the basis for the proration . . . falls within the implied statutory authority of the BOP." Pacheco-Camacho v. Hood, 272 F.3d 1266, 1270 (9th Cir. 2001). Not only did the Pacheco-Camacho court find that the BOP had the statutory authority to promulgate 28 C.F.R. 523.20, it also concluded that the BOP's interpretation of § 3624(b)(1) is reasonable and considered the "sentence imposed" calculation proposed by the petitioner to be "inconsistent with the statute . . . ." Id at 1268. The Ninth Circuit revisited the issue again in Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005), and reiterated that the BOP's interpretation of § 3624(b)(1) was reasonable. Id at 998-999.

Petitioner asserts that Pacheco-Camacho and Mujahid are unconstitutional rulings and violate the basic rules of statutory construction. Petitioner is unable to cite to any Supreme Court or

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en banc Ninth Circuit decision invalidating Pacheco-Camacho or Mujahid. Instead, he cites a comment by Supreme Court Justice John Paul Stevens made during the Court's denial of certiorari pertaining to a Fifth Circuit case. Justice Stephens stated that the calculation of GCT "has sufficient importance to merit further study, not only by judges but by other Government officials as well." Moreland v. Federa. Bureau of Prisons, 126 S.Ct. 1906 (2006) (Stevens, J., statement respecting denial of certiorari). This statement is insufficient to cast doubt on the vitality of Pacheco-Camacho and Mujahid.

Even if this court were not bound by Ninth Circuit precedent, a variety of other circuit courts have determined that the BOP's method for calculating GCT is reasonable. See Brown v. McFadden, 416 F.3d 1271, 1273 (11th Cir. 2005); Yi v. Federal Bureau of Prisons, 412 F.3d 526, 534 (4th Cir. 2005); Perez-Olivio v. Chavez, 394 F.3d 45, 53 (1st Cir. 2005); O'Donald v. Johns, 402 F.3d 172, 174 (3d Cir. 2005); Barnitt v. Martinez, 432 F.3d 868, 869 (8th Cir. 2005); White v. Schibana, 390 F.3d 997, 1002-03 (7th Cir. 2004). In light of the binding precedent of this Circuit, as well as the opinions of numerous other circuits holding that the BOP's method for calculating GCT is reasonable, the court cannot conclude that the BOP's method is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

///

II. ***Ex Post Facto* Challenge**.

Petitioner also asserts that the current calculation of his GCT violates the *Ex Post Facto* Clause because 28 C.F.R. § 523.20 had not been implemented at the time he committed his crime in 1990. He argues that at the time of his offense, only the Sentencing Commission's "sentence imposed" interpretation of § 3624(b) was in existence, and that interpretation was more favorable to him than the "time served" interpretation the BOP currently applies. He therefore contends that he had a settled expectation regarding the calculation of his GCT based on the Sentencing Commission's interpretation.

The *Ex Post Facto* Clause of the U.S. Constitution prohibits the enactment of laws which, by retroactive operation, increase the punishment for a crime after its commission. Garner v. Jones, 529 U.S. 244, 250 (2000). A law violates the *Ex Post Facto* Clause if: (1) it "appl[ies] to events occurring before its enactment," Weaver v. Graham, 450 U.S. 24, 29 (1981); and "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." Calif. Dep't. of Corr. v. Morales, 514 U.S. 499, 504 (1995).

While 28 C.F.R. § 523.20 was not formally implemented until 1997, the BOP has consistently calculated GCT using the time served methodology since the adoption of the Comprehensive Crime Control Act of 1984. See Declaration of Scott Erik Asphaug, p. 2. Because

the BOP has consistently calculated GCT based on a prisoner's time served, and since this practice predates petitioner's underlying crime, petitioner did not have a settled expectation in an alternative interpretation and was not disadvantaged by the enactment of 28 C.F.R. § 523.20. Accordingly, there is no ex post facto violation.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#21) is DENIED, and this case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 11th day of May, 2007.

/s/Michael W. Mosman
Michael W. Mosman
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISMAEL TABLADA,
Petitioner-Appellant,
v.
J.E. THOMAS,* Warden, Federal Correction Institute, Sheridan, Oregon,
Respondent-Appellee.

No. 07-35538
D.C. No.
CV 06-00762-MO
OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
March 7, 2008—Portland, Oregon

Filed July 3, 2008

Before: Marsha S. Berzon and Carlos T. Bea, Circuit Judges,
and Philip S. Gutierrez,** District Judge.

Opinion by Judge Gutierrez

*J.E. Thomas is substituted for his predecessor Charles Daniels as Warden of the Federal Correction Institute, Sheridan, Oregon. Fed. R. App. P. 43(c)(2).

**The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Stephen R. Sady, Chief Deputy Federal Public Defender, Portland, Oregon, for petitioner-appellant Ismael Tablada.

Karin J. Immergut, United States Attorney, Scott E. Asphaug, Assistant United States Attorney, and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for the respondent-appellee.

OPINION

GUTIERREZ, District Judge:

In this appeal, we consider whether the Bureau of Prisons ("BOP") violated the Administrative Procedure Act ("APA")

in promulgating 28 C.F.R. § 523.20, the regulation interpreting 18 U.S.C. § 3624(b), which governs the calculation of good conduct time for federal prisoners. The district court held that the BOP's interpretation in § 523.20 was reasonable and that it did not violate § 706(2)(A) of the APA. Accordingly, the district court denied the petitioner's habeas petition which challenged the BOP's calculation of the length of time the petitioner had left to serve on his sentence. The BOP has conceded it violated § 706(2)(A) of the APA by failing to articulate a rational basis for its decision to promulgate § 523.20. We hold that the remedy for this violation is to interpret the federal statute in accordance with the BOP's Program Statement 5880.28, and so affirm.

I. BACKGROUND & PROCEDURE

Ismael Tablada is an inmate at the Federal Correctional Institute in Sheridan, Oregon. Tablada was convicted of a narcotics offense in the District of Minnesota. On December 17, 1990, he was sentenced to a 20-year term of imprisonment, followed by 10 years of supervised release. As of February 2007, Tablada's projected release date, taking into consideration his good time credit, was April 16, 2008.[1]

On October 31, 2006, Tablada filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. In the petition, Tablada challenges the BOP's calculation of good time credits pursuant to the good time credit statute, 18 U.S.C. § 3624(b). Tablada contends that in promulgating its method for calculation of good time conduct credit in 28 C.F.R. § 523.20 and Program Statement 5880.28, Sentence Computa-

[1]Tablada's projected release date has passed. This fact, however, does not render his appeal moot because his sentence includes a term of supervised release. *See Mujahid v. Daniels*, 413 F.3d 991, 994-995 (2005) ("The 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot").

tion Manual (CCCA of 1984), the BOP failed to articulate a rational basis for its interpretation of the federal statute, thus violating 5 U.S.C. § 706(2)(A).[2]

A. *Good Time Credit Statute, 18 U.S.C. § 3624(b)*

Title 18 U.S.C. § 3624 governs the timing of federal prisoners' release from custody. Section 3624(b) provides in relevant part:

> (b) Credit toward service of sentence for satisfactory behavior.—
>
> (1) . . . a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's *term of imprisonment*, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . [C]redit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1) (emphasis added).

[2]Tablada's habeas corpus petition also claimed the BOP regulation and Program Statement are invalid because they violate the APA, 5 U.S.C. § 553, which requires a notice and comment period, and the Ex Post Facto Clause. The district court rejected both claims. Tablada has abandoned these claims by failing to raise them in his brief on appeal. *See Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007).

B. *BOP Program Statement and Regulation*

Since the passage of 18 U.S.C. § 3624(b) in 1984, the BOP has interpreted good time credit to be based on the *time served* by the prisoner. In November 1988, the BOP's general counsel issued an internal memorandum advising staff of the procedures for awarding good time credits under § 3624(b). The memorandum recited the text of § 3624(b), and stated that "good conduct time is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of *time served*." (emphasis added). In February 1992, BOP formalized this interpretation of § 3624 via the BOP Program Statement 5880.28.

In September 1997, the BOP published for comment as an interim rule 28 C.F.R. § 523.20, which was the BOP's interpretation of § 3624(b). 62 Fed. Reg. 50786-01 (Sept. 26, 1997). The commentary to the interim rule stated that "[t]he awarding and vesting of good conduct time at a rate of 54 days per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) ha[s] been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984." *Id.* at 50786. The BOP received no public comments, and, in 2003, published a change to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01 (June 25, 2003). On December 5, 2005, 28 C.F.R. § 523.20 became final. 70 Fed. Reg. 66752-01 (Nov. 3, 2005). 28 C.F.R. § 523.20 provides:

> (a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) *for each year served*. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 523.20(a) (emphasis added).[3]

In accordance with the BOP's regulatory scheme, the prisoner does not earn the first 54 days of good time credit until *after* completing 365 days of incarceration. *Mujahid*, 413 F.3d at 996. During the last year of incarceration, the BOP prorates the good time credits, awarding the prisoner 0.148 days credit [54/365 = 0.148] for every day actually served that year. *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1267-1268 (9th Cir. 2001). The BOP's admittedly "complicated" mathematical formula yields, for a model federal prisoner with a 10-year sentence, a maximum of 470 days of good time credit, which includes no credit when the prisoner is not in prison. *Id.* at 1269.

The BOP's interpretation of the good time conduct statute led to the filing of numerous lawsuits by federal prisoners. Like Tablada, these prisoners contested the methodology by which the BOP computes good time credit under § 3624(b)(1), reading the statute as awarding good time credit based on the *sentence imposed* rather than the *time served*. Under their interpretation, a model federal prisoner with a 10-year sentence would be entitled to 540 days of credit [54 days/yr x 10yrs = 540], rather than the 470 days awarded under the BOP's method. Faced with these competing interpretations of § 3624(b), we have upheld the validity of the BOP's interpretation of "term of imprisonment" in § 3624(b) as meaning time served rather than sentence imposed. *See Pacheco-Camacho*, 272 F.3d at 1271.

In *Pacheco-Camacho*, we noted that § 523.20 was adopted through the APA's notice-and-comment procedure, and that

[3]This version of 28 C.F.R. § 523.20 is different from the version quoted by the district court in his order. The district court used a previous version of the regulation which was effective until December 4, 2005. However, the distinctions between the previous version and the amended regulation, quoted here, do not affect the analysis.

the BOP's interpretation of § 3624(b) via § 523.20 was therefore entitled to full *Chevron* deference.[4] *Id.* at 1268 (citing *Chevron*, 467 U.S. 837). Applying the first step of the *Chevron* analysis, we looked at both the plain language of the statute and its legislative history, and found that the meaning of "term of imprisonment" as used in § 3624(b) was ambiguous. *Id.* at 1269-70. Proceeding to the second *Chevron* step, we then asked whether the BOP's interpretation was "reasonable." *Id.* at 1270. Answering in the affirmative, we concluded that the BOP's interpretation "comports with the statutory language of section 3624(b), and does not subvert the statutory design." *Id.*

Nearly four years later we revisited the same issue in *Mujahid*, 413 F.3d at 998. Citing *Pacheco-Camacho*, we reaffirmed the reasonableness of the BOP's interpretation of § 3624(b). *Id.* at 999 ("Mujahid's position rests on an interpretation of this statute at odds with binding authority of this court").

Notwithstanding our decisions in *Pacheco-Camacho* and *Mujahid*, Tablada filed this habeas petition, but under a different theory. Unlike the previous challenges to the reasonableness of the BOP's construction of § 3624(b), Tablada instead contends that the BOP has not complied with the requirements of the APA, 5 U.S.C. § 706, because it has not articu-

[4]Under *Chevron*, the Court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear," then the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Next, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citations omitted).

lated a rational basis for its decision to promulgate its interpretation of the statute. The United States District Court for the District of Oregon found that *Pacheco-Camacho* and *Mujahid* prevented it from considering Tablada's APA challenge, since the Ninth Circuit had already determined that the BOP's method for calculating good time credit was reasonable. This timely appeal followed.

After the parties submitted briefing on the instant case, we addressed the very procedural issue raised by Tablada in *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008). In *Arrington*, the petitioners brought petitions for habeas corpus which challenged 28 C.F.R. § 550.58(a)(1)(vi)(B), a BOP regulation which categorically excluded prisoners with convictions involving a firearm or other dangerous weapon or explosives from eligibility for early release under 18 U.S.C. § 3621(e). *Id.* at 1109. Reversing the district court's denial of the petitions, the Ninth Circuit held that the rule violated the APA, 5 U.S.C. § 706, because the administrative record contained no rationale explaining the BOP's decision for the categorical exclusion. *Id.* at 1114. The district court had identified two possible rational bases for the BOP decision: "(1) the increased risk that offenders with convictions involving firearms might pose to the public and (2) the need for uniformity in the application of the eligibility regulation." *Id.* at 1113 (citations omitted). The Ninth Circuit found the first rationale, articulated only in the BOP's brief and not contained in the administrative record, was "precisely the type of '*post hoc* rationalization [ ]' of appellate counsel that we are forbidden to consider in conducting review under the APA." *Id.* (emphasis and alteration in original) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). As for the second rationale, the Ninth Circuit found it inadequate because the BOP offered no explanation for why it chose categorical *exclusion* of prisoners with convictions involving firearms to achieve uniformity, rather than categorical *inclusion* of prisoners with nonviolent convictions involving fire-

arms, which would achieve the stated goal of uniformity. *Id.* at 1114.

The BOP now concedes that the regulation governing good time conduct credits suffers the same procedural infirmity as the regulation in *Arrington*, because the BOP failed to articulate in the administrative record the rationale upon which it relied when it promulgated the good time credit regulation.

II. STANDARD OF REVIEW

We review a district court's denial of a writ of habeas corpus pursuant to 28 U.S.C. § 2241 *de novo*. *Id.* at 1112.

In reviewing the BOP's conduct, we consider whether the agency's promulgation of the final rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We conduct this review based solely on the administrative record and determine whether the agency has articulated a rational basis for its decision. *Arrington*, 516 F.3d at 1112 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983)).

III. DISCUSSION

[1] In light of the BOP's concession that it failed to articulate in the administrative record a rationale for the interpretation of § 3624(b)(1) promulgated in § 523.20, the only remaining issue, then, is to determine the appropriate remedy. The BOP contends that any relief in this case should be limited to a procedural correction, allowing the BOP's longstanding practice governing good conduct sentencing credits to continue until the procedural correction is effected. Tablada asks us to grant his habeas petition and order the BOP to calculate his good conduct time based on his interpretation of the good time credit statute.

A. *Deference to the BOP Interpretation of § 3624(b)*

[2] Since its promulgation of Program Statement 5880.28 in 1992, the BOP has interpreted § 3624(b) to refer to time served, rather than sentence imposed. Thus, even if we take the invalid regulation out of the equation, we are left with an interpretation of § 3624(b) that bases good time credit on *time served* rather than *sentence imposed*.

An agency's rules are entitled to two possible levels of deference. Generally, *Chevron* deference is reserved for legislative rules that an agency issues within the ambit of the authority entrusted to it by Congress. *See United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). Such rules are characteristically promulgated only after notice and comment. *Id.* at 230. If, on the other hand, the agency rule or decision is not within an area of express delegation of authority or does not purport to have the force of law, it is entitled to a measure of deference proportional to its power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 228, 234. Under this level of review, we look to the process the agency used to arrive at its decision. *Id.*; *Skidmore*, 323 U.S. at 140. Among the factors we consider are the "interpretation's thoroughness, rational validity, [ ] consistency with prior and subsequent pronouncements," the " 'logic[ ] and expertness' of an agency decision, the care used in reaching the decision, as well as the formality of the process used." *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003) (citing *Skidmore*, 323 U.S. at 140 and *Mead*, 533 U.S. at 228).

Program Statement 5880.28 does not purport to carry the force of law and was not adopted after notice and comment. We therefore do not accord it *Chevron* deference. However, because Program Statement 5880.28 is an internal agency guideline, "akin to an 'interpretive rule' that 'do[es] not require notice and comment.' " *Reno v. Koray*, 515 U.S. 50,

61 (1995) (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)), we believe it is entitled to a measure of deference under *Skidmore*. We conclude that the Program Statement 5880.28 does meet the *Skidmore* standard, and thus provides the appropriate interpretation of § 3624. We turn now to the reasons underlying this conclusion.

B. *Application of Deference under Skidmore*

Applying the factors articulated in *Skidmore*, we find that the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable. Under *Skidmore*, one of the factors we consider is the "rational validity" of the agency decision. *See The Wilderness Society*, 353 F.3d at 1068. In *Pacheco-Camacho* and *Mujahid*, we already determined that the BOP's interpretation of § 3624(b) via its regulation, § 523.20, is "reasonable." *See Mujahid*, 413 F.3d at 998; *Pacheco-Camacho*, 272 F.3d at 1270-1271. Because Program Statement 5880.28 provides an interpretation of the federal statute identical to that in § 523.20, our conclusion in *Pacheco-Camacho* regarding the reasonableness of § 523.20 applies to it with equal force.

[3] In *Pacheco-Camacho*, we found that the BOP's methodology for calculating good time conduct credits was reasonable because it "comports with the statutory language of section 3624(b) . . . ." *Pacheco-Camacho*, 272 F.3d at 1270. In particular, we examined the statutory language of § 3624(b) and focused on its final sentence, which reads, "credit for the last year or portion of a year of the term of imprisonment shall be *prorated* and credited within the last six weeks of the sentence." *Id.* at 1268-69 (emphasis in original) (quoting 18 U.S.C. § 3624(b)(1)). Under the BOP's reading of the statute, "the model prisoner will ordinarily receive his fifty-four-day credit *after* complying with prison disciplinary rules for 365 days . . . ." *Id.* (emphasis in original). During the last year or portion of a year of the prisoner's sentence, the BOP would prorate the 54 days of credit a year to 0.148

day of credit for every actual day served during good behavior (54/365 = 0.148). *Id.* at 1267-68. Like Tablada, the plaintiff in *Pacheco-Camacho* read the statute as awarding good time credit based on the sentence imposed, so a prisoner with a ten-year sentence would receive 54-days per year multiplied by ten years, or 540 days. We found the plaintiff's reading inconsistent with a statute that contemplates prorating credit for the last year of imprisonment. *See id.* at 1269. We pointed out that under the plaintiff's interpretation (or in this case Tablada's), the model prisoner would receive a 54-day credit after serving only 311 days (365 days - 54 days), thus conferring a "windfall" on prisoners. *Id.* We noted that "[n]othing in the statute clearly suggests that Congress intended to give the prisoner such a windfall in his last year." *Id.* Likewise in *Mujahid*, we reaffirmed the BOP's interpretation of § 3624(b) as reasonable and subject to deference. *See Mujahid*, 413 F.3d at 997.

[4] In addition to the statutory language, we also discussed in *Pacheco-Camacho* the legislative history of § 3624, and determined that the BOP's methodology for calculating good time conduct credits "does not subvert the statutory design." *Pacheco-Camacho*, 272 F.3d at 1270. By enacting § 3624, Congress sought to simplify the computation of good time credits which, under its predecessor statute, computed good time credits after every month served. *Id.* at 1269. Thus, unlike the earlier scheme which called for calculating good time credits at different monthly rates depending on the length of the prison term and which allowed prison officials discretion to withhold and restore credits depending on the inmate's subsequent behavior, the new system embodied in § 3624 envisioned that a prisoner could calculate with certainty the time of his release. *Id.* Acknowledging the complexity of the BOP's computation method, we explained that "Congress chose to tolerate the additional complexity in order to arrive at a more equitable result," namely "an effective and fair pro-rating scheme, enabling inmates to calculate with reasonable certainty the end of their imprisonment . . . ." *Id.* at 1270. In

sum, based on our reasoning in *Pacheco-Camacho* and *Mujahid*, we find that the methodology utilized in Program Statement 5880.28 has "rational validity."

[5] Another factor we consider under *Skidmore* is whether the agency has applied its position consistently. *Mead*, 533 U.S. at 228; *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Here, BOP Program Statement 5880.28 has been in effect for at least sixteen years, since its implementation in 1992. *See Bowen v. Hood*, 202 F.3d 1211, 1221-1222 (9th Cir. 2000) (treating unambiguous language in a program statement as binding upon the BOP). Moreover, Program Statement 5880.28 incorporated the same sentencing credit methodology the BOP had been practicing since 1987. Tablada has not identified any instances where the BOP used any other methodology for calculating good time credits, including the methodology he proposes. We may thus assume that for more than twenty years, the BOP has consistently implemented its policy of calculating good time credits based on time served rather than sentence imposed.

[6] While Tablada and others may have asserted a reasonable alternative interpretation, *i.e.*, calculating good time credits based on sentence imposed rather than time served, the consistent and even application of the BOP's methodology promulgated in Program Statement 5880.28 since 1992 convinces us that we must accord deference to the BOP's interpretation. To change course now would have an extremely disruptive effect on the BOP's administration of the release of federal prisoners. Given this consideration, as well as the reasonableness of the BOP's interpretation of § 3624(b)(1) discussed in *Pacheco-Camacho*, we conclude that the BOP's methodology for calculating good time credits in Program Statement 5880.28 is reasonable and persuasive.

Finally, we address Tablada's argument that the United States Sentencing Commission ("Commission") has provided the appropriate standard by which to interpret § 3624. Tablada

insists that the Commission has interpreted the good time credit statute to mean a prisoner earns credit on each year of the sentence imposed. He contends that the fact that the Commission interprets § 3624 in this manner means that the "proper remedy" for the BOP's APA violation is to implement Tablada's interpretation, rather than the time served rule unless and until the BOP adopts a regulation complying with the APA that passes judicial muster.

Congress charged the Commission with establishing sentencing ranges for offenses, 28 U.S.C. § 994(b), and instructed it, "as a starting point in its development of the initial sets of guidelines," to ascertain the average sentences imposed and length of terms served prior to creation of the Commission. 28 U.S.C. § 994(m).[5] The Commission then engaged in a statistical analysis of data from thousands of sentences, and presented the results in the "Levels Table" in June 1987. *See* United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, at 27-39. Table 1(a), "Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time" presents a statistical analysis of average sentences. *See id.*

In the Supplementary Report, the Commission provided a definition of the term "adjusted for good time":

[5]28 U.S.C. § 994(m) states: "The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code."

> *Adjusted for good time.*" Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines. This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).

Id. at 23.

Tablada asserts that every federal prisoner has a term of imprisonment imposed based on a Sentencing Table that assumes good time credit based on 15% of the sentence imposed.[6] He claims that because the Commission was acting in its authority to interpret the Sentencing Reform Act—including § 3624(b) covering good time credit—the Commission's (and Tablada's interpretation) should prevail.

We are not persuaded by Tablada's argument. First, if the Commission felt the BOP was erroneously interpreting § 3624(b), it had ample opportunity to make its objections known during the notice and comment periods for 28 C.F.R. § 523.20, in September 1997 and June 2003. The Commission, however, remained silent. Second and more importantly, we have already found that the BOP is the agency charged with interpreting the good time credit statute. *See Pacheco-Camacho*, 272 F.3d at 1270 ("While the statute does not explicitly vest the BOP with the authority to determine the basis for the proration of good time credits, this power is implied by the BOP's statutory authority [under 18 U.S.C. § 3624] to award good time credits to inmates serving federal sentences"). For these reasons, Tablada's argument cannot stand.

[6]Tablada's interpretation of the statute results in a prisoner being eligible for a 15% reduction in his sentence, whereas the BOP's interpretation results in an approximately 13% reduction.

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IV. CONCLUSION

The BOP has admitted it violated § 706(2)(A) of the APA in failing to set forth a valid rationale for its interpretation of the federal good time credit statute when it promulgated 28 C.F.R. § 523.20. Nevertheless, invalidating § 523.20 leaves in place the same interpretation of § 3624(b) contained in BOP Program Statement 5880.28. We conclude that the BOP's methodology for calculating good time credits in Program Statement 5880.28 is both reasonable and persuasive under *Skidmore*. We therefore affirm the district court's denial of Tablada's petition for habeas corpus.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 20 2009

MOLLY C DWYER, CLERK
U.S. COURT OF APPEALS

ISMAEL TABLADA,

Petitioner - Appellant,

v.

CHARLES DANIELS, Warden, FCI-Sheridan, Federal Bureau of Prisons,

Respondent - Appellee.

No. 07-35538

D.C. No. CV-06-00762-MWM
District of Oregon,
Portland

ORDER

Before: BERZON and BEA, Circuit Judges, and GUTIERREZ,* District Judge.

The panel unanimously voted to deny appellant's petition for rehearing. Judge Berzon and Judge Bea voted to deny the petition for rehearing en banc. Judge Gutierrez recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

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* The Honorable Philip Gutierrez, District Judge, sitting by designation.

g. Good Conduct Time. Subsection 3624(b) states, "(b) Credit toward service of sentence for satisfactory behavior.-- A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time it is received. Credit that has been vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence."

For computation purposes, it is necessary to remember the following about subsection 3624(b):

(1) 54 days of GCT may be earned for each full year served on a sentence in excess of one year, with the GCT being

prorated for the last partial year. No GCT can be earned on, or awarded to, a sentence of one year or less.

(2) The BOP has 15 days after the end of each full year served to make a determination as to the amount of the 54 days that shall be awarded. If the BOP makes no decision about the amount of GCT to award in the 15 days at the end of the year just served, then the entire 54 days will be automatically credited to the sentence on the Vested Date. Therefore, before awarding any GCT on the Vested Date, staff shall review the SENTRY disciplinary log to determine if any GCT had been disallowed during the preceding anniversary period. If no GCT was disallowed during the preceding anniversary period, then the GCT SENTRY data base shall be updated with the total amount of GCT possible to earn and a copy of the disciplinary log, as well as a copy of the GCT record (both signed and dated by the ISM staff member making the change and the auditor), shall be placed in the Judgment and Commitment File.

If some or all of the GCT had been disallowed during the preceding anniversary period and no BP-448 (Good Conduct Time Action Notice) has been received by the Vested Date that matches the disciplinary log record, then the disciplinary log shall be used as the official record for disallowing GCT on the Vested Date. A copy of the disciplinary log shall be placed in the Judgment and Commitment File pending receipt of a BP-448 that matches the information on the disciplinary log. After receipt of the BP-448 the disciplinary log copy shall be destroyed. Again, an updated copy of the

SENTRY GCT record (signed and dated by the TSM staff member making the change and the auditor) shall be placed in the Judgment and Commitment File.

Once GCT has been credited, it vests and may not later be disallowed. If good cause exists (e.g., riot, food strike, work stoppage, etc.) or the prisoner commits an act of misconduct (See Program Statement on Inmate Discipline and Special Housing Units) that occurred during the prior year but does not become known until after the 15 day time limit has expired, however, then the GCT may be disallowed even though the time limit has been exceeded. In addition, if an act of misconduct is referred to the Discipline Hearing Officer (DHO) and the DHO is unable to dispose of the referral in the manner prescribed by the Program Statement on Inmate Discipline and Special Housing Units within the 15 days allowed, then the official award or disallowance of the GCT may be delayed for the period of time necessary to comply with that Program Statement.

In any case not covered in the preceding paragraph in which GCT is not disallowed within the proper time limit, the RISA should be contacted for instructions.

(3) GCT that is disallowed and that is not awarded from the maximum possible to award during the 15 day time limit, may not be awarded at a later time. If a disallowance of GCT is successfully appealed, or if the BOP has for some reason erroneously disallowed GCT, then the GCT may be credited at that time.

(4) The BOP has six weeks before the end of the sentence to make a determination about how much of the prorated GCT to award for the last portion of a year of the term of imprisonment. If the BOP makes no decision about the amount of GCT to award in the last six weeks of the sentence, then the entire amount possible to award for that period of time will be automatically credited to the sentence on the last day of the sentence (date of release and Vested Date). Therefore, before awarding any GCT on the Vested Date, staff shall review the SENTRY disciplinary log to determine if any GCT had been disallowed during the preceding anniversary period. If no GCT was disallowed during the preceding anniversary period, then the GCT SENTRY data base shall be updated with the total amount of GCT possible to earn and a copy of the disciplinary log, as well as a copy of the GCT record (signed and dated by the ISM staff member making the change and the auditor), shall be placed in the Judgment and Commitment File.

If some or all of the GCT had been disallowed during the preceding anniversary period and no BP-448 has been received by the Vested Date that matches the disciplinary log record, then the disciplinary log shall be used as the official record for disallowing GCT on the Vested Date. A copy of the disciplinary log shall be placed in the Judgment and Commitment File pending receipt of a BP-448 that matches the information on the disciplinary log. After receipt of the BP-448 the disciplinary log copy shall be destroyed. Again, an updated

copy of the SENTRY GCT record (signed and dated by the ISM staff member making the change and the auditor) shall be placed in the Judgment and Commitment File.

(5) An action to delay, disallow or suspend the award of some or all of the GCT for a decision at a later time that is not within the 15 day, or six week, consideration time periods is not authorized.

For release purposes, subsection 3624(b) is the most important provision in the computation process since the proper application of that subsection determines the actual statutory date of release for the prisoner. The release date is determined, of course, by subtracting the total amount of GCT awarded during the term of the sentence from the full term date of the sentence. The total amount of GCT awarded during the term of a sentence is found by adding the amount of GCT awarded at the end of each year to the amount of GCT awarded for the last portion of a year.

As noted in (1) above, 54 days of GCT may be awarded for each full year served on a sentence in excess of one year. Since 54 days of GCT per year cannot be divided evenly into one year, or 12 months, or 52 weeks, or 365 days, determining the amount of GCT that may be awarded for the last portion of a year on the sentence becomes arithmetically complicated. The BOP has developed a formula (hereinafter called the "GCT formula") that

best conforms to the statute when calculating the maximum number of days that may be awarded for the time served during the last portion of a year on the sentence.

The GCT formula is based on dividing 54 days (the maximum number of days that can be awarded for one year in service of a sentence) into one day which results in the portion of one day of GCT (continued on next page)

that may be awarded for one day served on a sentence. 365 days divided into 54 days equals .148. Since .148 is less than one full day, no GCT can be awarded for one day served on the sentence. Two days of service on a sentence equals .296 (2 x .148) or zero days GCT; three days equals .444 (3 x .148) or zero days GCT; four days equals .592 (4 x .148) or zero days GCT; five days equals .74 (5 x .148) or zero days GCT; six days equals .888 (6 x .148) or zero days GCT; and seven days equals 1.036 (7 x .148) or 1 day GCT. The fraction is always dropped.

Since, in accordance with the statute (18 USC § 3624(b)), no GCT can be awarded to a sentence of one year or less, then the very shortest sentence that can be awarded GCT is a sentence of 1 year and 1 day. Because a prisoner would accrue GCT while serving a sentence of 1 year and 1 day and, therefore, serve something less than the full sentence, it would be impossible to accrue the full 54 days of GCT for a sentence of 1 year and 1 day. As a result, the GCT formula previously discussed must be utilized as shown below to determine the amount of GCT to award for a partial year. This method of calculating the GCT possible to award for the last portion of a year of a sentence to be served must be followed in all partial year calculations. (For the purpose of this demonstration, the sentence of 1 year and 1 day equals 366 days.)

Step No. 1

Sentence = 366 - 54 = 312 days

312 days served does not equal 54 days of GCT but does equal 46 days.

Step No. 2

Days Served = 312 x .148 = 46.176 = 46 days GCT

Subtracting 46 days from the sentence of 366 days results in 320 days to be served.

Step No. 3

Sentence = 366 - 46 = 320 days

46 days of GCT is not enough because,46 plus 312 days to be served equals a sentence of 358 days, 8 days short of a sentence of 366 days (1 year and 1 day).

Step No. 4

Time Served = 312 + 46 = 358 days

Comparing 320 days to serve, which is too much time to serve, with 312 days to serve, which is not enough time to serve, reveals that the amount of GCT that can be earned must fall somewhere between 54 and 46 days. As a result, the next step is to determine how much GCT can be earned on 320 days served.

Step No. 5

Time Served = 320 x .148 = 47.36 = 47 days GCT

Subtracting 47 days from the sentence of 366 days (1 year and 1 day)
results in 319 days to be served.

Step No. 6

Sentence = 366 - 47 = 319 days

Utilizing the GCT formula, it is learned that 319 days served equals
47 days GCT.

Step No. 7

Time Served = 319 x .148 = 47.212 = 47 days GCT

Adding 319 days time served to 47 days GCT does equal a sentence of 366 days (1 year and 1 day).

Step No. 8

Time Served = 319 + 47 = 366 days

The amount of GCT that can be awarded for a sentence of 366 days (1 year and 1 day) is 47 days.

The steps that were followed in the preceding example must be followed in every instance when it is necessary to determine the amount of GCT that can be awarded for a partial year served on a sentence. A short version of the preceding eight steps is shown below.

366 x .148 = 54.168 (366 + 54 = 420)
366 - 54= 312 x .148 = 46.176 (312 + 46 = 358)
366 - 46= 320 x .148 = 47.36 (320 + 47 = 367)
366 - 47= 319 x .148 = 47.212 (319 + 47 = 366)

Thus--319 days actually served plus 47 days of GCT equals 366 days, or a sentence of 1 year and 1 day.

There is one exception to the "fraction is always dropped" rule. For instance, if the partial year remaining on a sentence equals 7 days and if the full 7 days were served, then 1 day of GCT credit (7 x .148 = 1.036 = 1 day) could be awarded. If the 1 day is awarded, however, then only 6 days would actually be served on the final 7 days and for 6 days served no GCT (6 x .148 = .888 = 0 days) would be authorized. This arithmetical conflict occurs each time that the actual time to serve plus the GCT equals 1 day less than that final portion of the year remaining on the sentence. For example, applying the GCT formula to a final portion of a year of 294 days results in the following calculation.

294 x .148 = 43.512 (294 + 43 = 337)
294 - 43= 251 x .148 = 37.148 (251 + 37 = 288)
294 - 37= 257 x .148 = 38.036 (257 + 38 = 295)
294 - 38= 256 x .148 = 37.888 (256 + 37 = 293)

As you can see from above, the GCT formula does not produce a result that will allow the number of days actually served plus the GCT to equal 294 days. Since it is to the advantage of the prisoner to award an additional full day for 37.888 days (38 days instead of 37 days) of GCT in such a situation, the BOP will award that additional 1 full day even though the time served results in a fraction (.888 in this case) short of a full day. (See Good Conduct Time Chart)

It is essential to learn that GCT is not awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served. In other words, when the GCT awarded plus the number of days actually served equals the days remaining on the sentence, then the prisoner shall be released on the date arrived at in the computation process (days remaining on sentence - (GCT + days served) = release date). The following example demonstrates the computation process for determining a final release date on a sentence with 355 days remaining and that has a 10-10-91 date of release prior to the award of GCT.

355 x .148 = 52.54 (355 + 52 = 407)
355 - 52= 303 x .148 = 44.844 (303 + 44 = 347)
355 - 44= 311 x .148 = 46.028 (311 + 46 = 357)
355 - 46= 309 x .148 = 45.732 (309 + 45 = 354)
355 - 45= 310 x .148 = 45.88 (310 + 45 = 355)

Release Date = 10-10-91 = 19276
GCT = -00045
Final Release Date = 08-26-91 = 19231

Based on the partial year formula, any sentence that equals 419 days (e.g., 1 year, 1 month and 21 days) through 425 days (e.g., 1 year, 1 month and 29 days), can receive 54 days of GCT. Beginning with sentences that equal 426 days, more than 54 days of GCT can be awarded. As a result, any sentence that exceeds 425 days will require an Anniversary Date and a prorated year computation.

Now that the method for finding the release date for a partial year has been shown, the following example demonstrates the calculation of a sentence of 1 year and 1 month with no jail time credit or inoperative time.

Date Sentence Began	90-06-23	
Sentence Length	+ 01-01-00	
Full Term Date	91-07-22*	= 19136
Date Sentence Began	90-06-22*	= -18841
Days Remaining		395

395 x .148 = 58.46 (395 + 58 = 453)
395 - 58= 337 x .148 = 49.876 (337 + 49 = 386)
395 - 49= 346 x .148 = 51.208 (346 + 51 = 397)
395 - 51= 344 x .148 = 50.912 (344 + 50 = 394)
395 - 50= 345 x .148 = 51.06 (345 + 51 = 396)

You will note that the GCT formula does not allow the GCT plus the days served (344 + 50 = 394 and 345 + 51 = 396) to equal the days remaining on the sentence (395). As a result, in accordance with the exception to always "dropping the fraction" rule, 51 days of GCT is awarded for the partial year rather than 50 days.

More examples follow at the end of this chapter that demonstrate all the elements of a sentence that can result from a sentence to a term of imprisonment.

The next step in the calculation process of a sentence is to determine the "Vested Date", sometimes incorrectly referred to as the "Anniversary Date." The Anniversary Date is the date after one full year has been served on a sentence. The Vested Date is the date that is 15 days beyond the last day served on a full year and, in the case of a partial year, the last day of the sentence. As noted in 18 U.S.C. § 3624(b) (quoted in its entirety above), the BOP has 15 days after the end of each full year served on the sentence to decide how much of 54 days GCT shall be awarded and six weeks before the end of the sentence to determine the prorated amount of GCT that shall be awarded. Staff shall review appropriate documentation and award the proper amount of GCT accordingly within the 15 day or last six weeks consideration period.

Staff may enter any number of days desired into the SENTRY data base at any time, except on the Vested Date, to learn a prisoner's projected release date for release planning purposes. This type of entry into the SENTRY data base does not constitute a vested award of GCT.

In order to determine the Vested Date, the release date with the maximum possible amount of GCT to award must be learned. Learning (continued on next page)

this information is necessary to make a determination about whether the fifteen days or the six weeks, or both, need to be known to decide the amount of GCT to award.

Beginning with a sentence that is 7 days longer than the last full year that is served on a sentence that is eligible for GCT through a sentence that is 65 days longer than the last full year served on a sentence that is eligible for GCT, there is, or needs to be an overlapping of the 15 days and six weeks GCT consideration time. In other words, during such times, and sometimes at the same time, consideration must be given for both the amount of GCT to award for one full year of service on the sentence and for a partial year. For example, a sentence of 1 year, 2 months and 2 days imposed on 01-10-88 would have a full term date of 03-11-89. If the full 15 days were used to decide that 54 days GCT should be awarded, the 15 days (Vested Date) would expire on 01-24-89. The release date would be 01-16-89, 8 days before the award could be made. In addition, no consideration would have been given for the 7 days served over one year for which 1 day of GCT could be awarded, thus frustrating and nullifying the very reason for which the six week consideration period of time was statutorily devised. Remember, failure to award an amount of GCT less than the amount that can be awarded on the Vested Date then requires that the full amount possible to award must be credited.

In order to overcome the problem just described and to give staff ample time to make proper decisions about the amount of time to award,

a system that accommodates both the 15 days and six weeks, called "overlapping" has been developed.

Considering the amount of time to award can begin at any time, but the official award must be made within the time frame (15 days or six weeks) required by the statute. As stated earlier, the official award of GCT need not be made until the last possible day to make the award allowed by statute. If ISM staff follow this practice, it will allow time to change the proposed amount to award up to and including the final day that the award can be made, including the date of release for a partial year. If, of course, any GCT is disallowed during the partial year, then it is necessary to make the actual award of the balance of the GCT to be awarded on the original date calculated for release. **No GCT** may be disallowed during the service of the disallowed GCT. **No GCT** shall be awarded for the time spent serving the disallowed GCT.

Following are some examples that demonstrate overlapping situations.

REFERENCES TO "TERM OF IMPRISONMENT" IN TITLE 18 OF UNITED STATES CODE

A computer-assisted search of the United States Code resulted in about 100 hits for "term of imprisonment" in Title 18. The following are statutory uses of "term of imprisonment" that appear to indicate the judge's imposed sentence to incarceration, with "term of imprisonment" in bold.

18 U.S.C. §924(c)(1)(D)(ii): "***term of imprisonment*** imposed by a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person . . ."

18 U.S.C. §3142(e): creating statutory presumptions regarding pretrial release "if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum ***term of imprisonment*** of ten years or more is prescribed in the Controlled Substances Act . . ."

18 U.S.C. §3143(a)(1): creating a presumption of detention pending review of a sentence except "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a ***term of imprisonment*** . . ."

18 U.S.C. §3156(a)(3): defining a felony as "an offense punishable by a maximum ***term of imprisonment*** of more than one year."

18 U.S.C. §3551(b)(3): authorizing that a defendant found guilty of an offense shall be sentenced to probation, a fine, or "a ***term of imprisonment*** as authorized by subchapter D [18 U.S.C. § 3581 et seq.]"

18 U.S.C. §3553(c): requiring production of a transcription of sentencing proceedings "if the sentence includes a ***term of imprisonment***, to the Bureau of Prisons."

18 U.S.C. §3559(a): categorizing offenses based on "the maximum ***term of imprisonment*** authorized . . ."

18 U.S.C. §3561(a)(J) & (b): prohibiting probation if "the defendant is sentenced at the same time to a ***term of imprisonment*** . . ." and authorizing domestic violence offenders to receive probation "if not sentenced to a ***term of imprisonment***."

18 U.S.C. §3565(b): requiring certain probation violations to be punished by "a sentence that includes a ***term of imprisonment***."

18 U.S.C. §3581(a) & (b): allowing that a guilty defendant "may be sentenced to a ***term of imprisonment***," and providing for "authorized ***terms of imprisonment***" based on the category of the offense.

18 U.S.C. §3582(a): listing factors that a court should consider "in determining whether to impose a ***term of imprisonment*** . . ."

18 U.S.C. §3582(c): providing for "modification of a ***term of imprisonment***" for cooperation, retroactive amendment to the guidelines, and other limited circumstances.

18 U.S.C. §3583(a): authorizing imposition of supervised release "in imposing a sentence to a ***term of imprisonment*** . . ."

18 U.S.C. §3583(g),(h) & (i): instructing a court faced with violation of supervised release when to "require the defendant to serve a ***term of imprisonment*** . . .," to reimpose supervised release "less any ***term of imprisonment*** that was imposed upon revocation of supervised release," and to preserve the power of the court "to order the defendant to serve a ***term of imprisonment***" after issuance of a warrant based on the supervised release violation.

18 U.S.C. §3584: instructing the court regarding consecutive and concurrent sentences where "multiple ***terms of imprisonment*** are imposed," requiring the court to consider sentencing factors "as to each offense for which a ***term of imprisonment*** is imposed," and directing that "[m]ultiple ***terms of imprisonment*** [. . .] shall be treated for administrative purposes as a single, aggregate ***term of imprisonment***."

18 U.S.C. §3585(a) & (b): providing the starting point for when "a ***term of imprisonment*** commences" and requiring that a defendant "shall be given credit toward the service of a ***term of imprisonment*** for any time he has spent in official detention prior to the date the sentence commences . . ."

18 U.S.C. §3614(b): outlining circumstances under which a defendant "may be sentenced to a ***term of imprisonment***" at a resentencing based of failure to pay a fine or restitution.

18 U.S.C. §3621(a): providing for the commitment to the custody of the Bureau of Prison of a "person who has been sentenced to a ***term of imprisonment*** . . ."

18 U.S.C. §3624(a): requiring that a "prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's ***term of imprisonment***, less any time credited toward the service of the prisoner's sentence as provided in subsection (b)."

18 U.S.C. §3624(c): providing for prerelease custody to the extent practicable to "assure that a prisoner serving a ***term of imprisonment*** spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served" in community corrections.

18 U.S.C. §3742(a)(3) & (b)(3): authorizing appeals by the defendant "to the extent that the sentence includes a [greater] fine or ***term of imprisonment***, probation, or supervised release than the maximum established in the guideline range . . .;" authorizing appeals by the government "to the extent that the sentence includes a [lesser] fine or ***term of imprisonment***, probation, or supervised release than the minimum established in the guideline range . . .

18 U.S.C. §4014(b): authorizing special HIV procedures where "the Attorney General has a well-founded reason to believe that a person sentenced to a ***term of imprisonment*** for a Federal offense . . ." may have transmitted the virus.

18 U.S.C.A. §4046(a): limiting eligibility for the BOP's shock incarceration program to "any person who is sentenced to a ***term of imprisonment*** of more than 12, but not more than 30, months."

REFERENCES TO "TERM OF IMPRISONMENT" IN THE FEDERAL SENTENCING GUIDELINES

The federal sentencing guidelines include a section devoted to the imposition of a "term of imprisonment. The following is the heading text and commentary the Guidelines with "term of imprisonment" emphasized:

Imposition of a *Term of Imprisonment*

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by--

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by--

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;

(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum ***term of imprisonment*** specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum ***term of imprisonment*** specified in the

applicable guideline range is at least one but not more than six months), the court has three options:

(A) It may impose a sentence of imprisonment.

(B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum ***term of imprisonment*** specified in the guideline range.

(C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum ***term of imprisonment*** specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum ***term of imprisonment*** required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum ***term of imprisonment*** required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum ***term of imprisonment*** required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. Subsection (e) sets forth a schedule of imprisonment substitutes.

6. There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.

7. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.

8. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum ***term of imprisonment*** specified in the

applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 51); November 1, 1989 (see Appendix C, amendments 271, 275, and 302); November 1, 1992 (see Appendix C, amendment 462).

FSG 5C1.1 (11/1/92)

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

MICHAEL BARBER, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

TAHIR JIHAD-BLACK, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon on June 18, 2009, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Kelly A. Zusman
Assistant U.S. Attorney
600 United States Courthouse
1000 SW Third Avenue
Portland, OR 97204

Elena Kagan
Solicitor General
Room 5614
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington. D.C., 20543, for filing on this 6th day of July, 2009, with first-class postage prepaid.

Dated this 6th day of July, 2009.

Stephen R. Sady
Attorney for Petitioners

Subscribed and sworn to before me this 6th day of July, 2009.

Notary Public of Oregon

OFFICIAL SEAL
JILL C DOZARK
NOTARY PUBLIC-OREGON
COMMISSION NO. 398412
MY COMMISSION EXPIRES OCTOBER 26, 2009

OPPOSITION BRIEF

Nos. 08-11034, 09-5201

IN THE SUPREME COURT OF THE UNITED STATES

ISMAEL TABLADA, PETITIONER

v.

J.E. THOMAS, WARDEN

MICHAEL GARY BARBER, ET AL., PETITIONERS

v.

J.E. THOMAS, WARDEN

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3624(b), which provides that a federal prisoner may receive credit toward the service of his sentence for exemplary conduct, requires the Federal Bureau of Prisons to calculate such credit on the basis of the sentence imposed rather than on the basis of the time served.

2. Whether Congress has delegated the interpretation of 18 U.S.C. 3624(b) to the United States Sentencing Commission rather than to the Federal Bureau of Prisons.

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 08-11034 (Tablada App. A1-A16) is reported at 533 F.3d 800. The order of the court of appeals in No. 09-5201 (Barber App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 08-11034 was entered on July 3, 2008. A petition for rehearing was denied on March 20, 2009 (Tablada App. C). The petition for a writ of certiorari was filed on June 18, 2009. The judgment of the court of appeals in No. 09-5201 was entered on April 20, 2009. The petition for a writ of certiorari was filed on July 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are former or current federal inmates convicted of various drug offenses. Pursuant to 28 U.S.C. 2241, they filed petitions for writs of habeas corpus to challenge the method used by the Bureau of Prisons (BOP) for calculating "good conduct time," i.e., credit against their sentences awarded for exemplary behavior (GCT credit). The district court ruled that the BOP's method is lawful and denied the petitions. Tablada App. B1-B8; Barber App. 13-14. The court of appeals affirmed. Tablada App. A1-A16; Barber App. 1-2.

1. Federal prisoners may receive credit toward their sentences for exemplary behavior while incarcerated. Their eligibility for such GCT credit is governed by 18 U.S.C. 3624(b)(1), which provides that

> a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54

> days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. * * * [I]f the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. * * * Credit that has not been earned may not later be granted. * * * Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

Congress adopted Section 3624 as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, Title II § 212(a)(2), 98 Stat. 2008. Since that time, the BOP has interpreted Section 3624(b)(1) to allow up to 54 days of GCT credit for each year actually served. See 28 C.F.R. 523.20. The BOP memorialized that interpretation in an internal memorandum in November 1988, and later formalized it in Program Statement 5880.28 in February 1992. See Tablada App. A5. Then, in September 1997, the BOP published its interpretation for comment as an interim rule, 28 C.F.R. 523.20, which became final as revised in December 2005. See Tablada App. A5.

That regulation provides in pertinent part that "the Bureau will award 54 days credit towards service of sentence (good conduct time credit) for every year served." 28 C.F.R. 523.20(a) (emphasis added). In accordance with the regulation, BOP does not credit a prisoner with the first 54 days of GCT credit until after the

prisoner has completed a full year of incarceration. Tablada App. A6. Because the BOP calculates GCT credit on the basis of time actually served rather than on the basis of the sentence imposed, a prisoner's total potential credit is somewhat less than 54 days per year of the sentence originally imposed. Ibid.

The BOP's interpretation of Section 3624(b)(1) led to the filing of numerous lawsuits by federal prisoners.[1] Every court of appeals to consider the issue has held that the BOP's method of calculating GCT credit is consistent with Section 3624(b)(1). See, e.g., Wright v. Federal Bureau of Prisons, 451 F.3d 1231, 1235-1236 (10th Cir. 2006); Bernitt v. Martinez, 432 F.3d 868, 869 (8th Cir. 2005) (per curiam); Moreland v. Federal Bureau of Prisons, 431 F.3d 180, 186 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006); Sash v. Zenk, 428 F.3d 132, 136-138 (2d Cir. 2005), as amended, 439 F.3d 61 (2006); Petty v. Stine, 424 F.3d 509, 510 (6th Cir. 2005); Brown v. McFadden, 416 F.3d 1271, 1272 (11th Cir. 2005) (per curiam); Yi v. Federal Bureau of Prisons, 412 F.3d 526,

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[1] Those litigants claimed that Section 3624(b)(1) entitled them to their first 54 days of GCT credit before completing a full year of incarceration. On their approach, the BOP would have been required to subtract the first 54 days of GCT credit from the end-date of the first year of a prisoner's sentence. For example, a prisoner with model behavior who began serving his sentence on January 1 would finish his first year of service for purposes of GCT credit on November 7 (54 days before December 31). His second year of service for purposes of GCT credit then would commence at that time and continue until September 14 of the following year (54 days before November 7). In each successive calendar year, the prisoner would need to serve less actual time in order to earn the full 54 days of GCT credit. See Tablada App. A6.

530-535 (4th Cir. 2005); O'Donald v. Johns, 402 F.3d 172 (3d Cir. 2005), cert. denied sub nom., Moreland v. Federal Bureau of Prisons, 547 U.S. 1106 (2006); Perez-Olivo v. Chavez, 394 F.3d 45, 48-54 (1st Cir. 2005); White v. Scibana, 390 F.3d 997, 1000-1003 (7th Cir.), cert. denied, 545 U.S. 1116 (2005); Pacheco-Camacho v. Hood, 272 F.3d 1266, 1268-1272 (9th Cir. 2001), cert. denied, 535 U.S. 1105 (2002).

2. Petitioner Ismael Tablada was convicted of conspiring to distribute and possess with the intent to distribute cocaine, in violation of 18 U.S.C. 846. On December 17, 1990, he was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Tablada App. A3. At present, he has been released from prison and is serving his term of supervised release.

Petitioners Michael Barber and Tahir Jihad-Black are both currently incarcerated in an Oregon federal prison. Petitioner Barber was convicted of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. 846; attempted possession and possession of ephedrine with intent to manufacture methamphetamine, in violation of 21 U.S.C. 841; use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1); and possession of a firearm, in violation of 26 U.S.C. 5861. On November 4, 1994, he was sentenced to 320 months of imprisonment, to be followed by five years of supervised release. Petitioner Jihad-Black was convicted of possession of an unregistered firearm,

in violation of 26 U.S.C. 5861(d); and possessing a firearm after a conviction for a felony offense, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). On October 4, 1997, he was sentenced to 262 months of imprisonment, to be followed by five years of supervised release.

While all of the petitioners were incarcerated, they filed petitions for writs of habeas corpus pursuant to 28 U.S.C. 2241. Although they challenged the BOP's method of calculating GCT credit, they did so on the basis of a new theory: that when the BOP promulgated its regulation (28 C.F.R. 523.20(a)) interpreting the GCT credit statute (18 U.S.C. 3624(b)(1)), it violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), by failing to articulate a rational basis for its interpretation. Tablada App. A3-A4, A7-A8. They also claimed that the United States Sentencing Commission, not the BOP, had the authority to interpret Section 3624(b)(1) and had adopted a method of calculating GCT credit on the basis of the sentence imposed rather than time served. Id. at A13-A15. The district court rejected petitioners' arguments and denied them relief. Tablada App. B1-B8; Barber App. 3-4.[2]

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[2] At the request of the parties, the district court incorporated the record, including the order and opinion, in petitioner Tablada's case into the record of petitioner Barber's case and petitioner Jihad-Black's case. Barber App. 3-4. On appeal, on the basis of its opinion in petitioner Tablada's case, the court of appeals summarily affirmed the judgments in petitioner Barber's case and petitioner Jihad-Black's case. Barber App. 1-2.

3. The court of appeals affirmed. Tablada App. A1-A16; Barber App. 1-2. Under its decision in Arrington v. Daniels, 516 F.3d 1106 (2008), the court held that the BOP was required to articulate the rationale for its GCT credit regulation in the accompanying administrative record. Tablada App. A8. The BOP conceded that it had not done that when promulgating 28 C.F.R. 523.20(a), id. at A9; the court held, however, that even in the absence of the regulation, it should defer to the internal BOP guideline that predated the regulation -- Program Statement 5880.28 -- under Skidmore v. Swift & Co., 323 U.S. 134 (1944). Tablada App. A10-A13; see id. at A11 ("Applying the factors articulated in Skidmore, we find that the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable."). Finally, the court rejected petitioners' argument that the Sentencing Commission rather than the BOP is the agency charged with interpreting the GCT credit statute. Id. at A15.

ARGUMENT

Petitioners claim that this Court should grant certiorari to determine (1) whether 18 U.S.C. 3624(b) requires the BOP to calculate GCT credit on the basis of the sentence imposed rather than on the basis of the time served (Pet. 12-26, 30-33); and

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The court of appeals then consolidated all three cases for the purposes of filing a petition for a writ of certiorari. Because the petitions in No. 08-11034 and No. 09-5201 raise the same issues, the United States files this consolidated response.

(2) whether Congress delegated the interpretation of 18 U.S.C. 3624(b) to the Sentencing Commission rather than to the BOP (Pet. 27-30). With respect to each of those claims, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As a threshold matter, petitioner Tablada's case is moot because he has been released from federal prison. The court of appeals held that his release "does not render his appeal moot because his sentence includes a term of supervised release," Tablada App. A3 n.1, and there is a "'possibility' that the sentencing court would use its discretion to reduce a term of supervised release," ibid. (quoting Mujahid v. Daniels, 413 F.3d 991, 994-995 (2005)). As the Third Circuit has reasoned, however, "[t]he possibility that the sentencing court will use its discretion to modify the length of [petitioner's] term of supervised release under 18 U.S.C. 3583(e), * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 2009 WL 1402275 (Oct. 20, 2009); see U.S. Br. in Opp., Burkey v. Marberry (No. 08-1428), 2009 WL 3006227, at *7-*15. Because petitioners Barber and Jihad-Black remain incarcerated in federal prison, their petitions are not moot.

2. a. On the merits, petitioners argue that 18 U.S.C. 3624(b)(1) "unambiguously requires" that the BOP calculate GCT credit on the basis of the sentence imposed. Tablada Pet. 14 (emphasis omitted); see id. at 14-22; Barber Pet. 15-23. The courts of appeals have unanimously rejected that argument, see pp. 4-5, supra; and this Court has declined review in those cases, see, e.g., Moreland, 547 U.S. 1106 (2006) (No. 05-8268); ibid. (Stevens, J., respecting the denial of the petitions for writs of certiorari) ("The fact that 10 Courts of Appeals have either agreed with, or deferred to, the Government's interpretation provides a principled basis for denying these certiorari petitions."). There is no reason for a different result here.[3]

b. Petitioners contend (Tablada Pet. 32-34; Barber Pet. 32-34) that once the court of appeals set aside 28 C.F.R. 523.20(a) under the APA, it was not permitted to defer to Program Statement 5880.28. In construing Section 3624(b)(1), however, the court of

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[3] Although petitioners argue (Tablada Pet. 14-26; Barber Pet. 15-26) that their interpretation is consistent with the text of Section 3624(b)(1), its legislative history, and the rule of lenity, the courts of appeals have considered and rejected all of those arguments. See U.S. Br. in Opp., Petty v. Stine (No. 05-9782), 2006 WL 1644662, at *3; see also Wright, 451 F.3d at 1234-36; Moreland, 431 F.3d at 184-188; Sash, 428 F.3d at 134-138; Pacheco-Camacho, 413 F.3d at 1271-1272; Yi, 412 F.3d at 530-533; O'Donald, 402 F.3d at 174; Perez-Olivio, 394 F.3d at 53. Petitioners assert (Tablada Pet. 26; Barber Pet. 26) that the decision below conflicts with Dolfi v. Pontesso, 156 F.3d 696 (6th Cir. 1998), and Evans v. United States Parole Commission, 78 F.3d 262 (7th Cir. 1996), but neither of those decisions applies the rule of lenity in the interpretation of Section 3624(b)(1).

appeals properly considered whether the BOP's longstanding interpretation -- as set forth in pre-regulation Program Statement 5880.28 -- was entitled to deference under Skidmore. The court concluded that "[a]pplying the factors articulated in Skidmore, * * * the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable." Tablada App. A11; id. at A11-13. Petitioners maintain (Tablada Pet. 23-26; Barber Pet. 23-27) that the rule of lenity should be applied before a court defers to an agency's construction, but that is not so. See Reno v. Koray, 515 U.S. 50, 61 (1995) (applying deference to a BOP Program Statement); id. at 64-65 (rejecting application of the rule of lenity). Nor does the court of appeals' decision conflict with any decision of this Court or of any court of appeals. Although the court of appeals deferred to the BOP's interpretation under Skidmore rather than Chevron, the fact remains that every court of appeals to consider Section 3624(b)(1) has held that it permits the BOP to calculate GCT credit on the basis of time actually served by federal prisoners.

3. Finally, petitioners argue (Tablada Pet. 27-32; Barber Pet. 27-32) that Congress has delegated the interpretation of Section 3624(b)(1) to the Sentencing Commission, which, they maintain, has endorsed their approach to calculating GCT credit. As the court of appeals noted, the evidence does not demonstrate that the Sentencing Commission actually disagrees with the BOP's

interpretation of Section 3624(b)(1). Tablada App. A15. Petitioners rely (Pet. 27) on a Supplementary Report published by the Sentencing Commission in June 1987 -- more than a year before the BOP issued an internal memorandum interpreting Section 3624(b)(1) to allow GCT credit for time served, and nearly five years before BOP formalized that interpretation in Program Statement 5880.28. Id. at A5, A15. Moreover, in the 17 years since the BOP issued Program Statement 5880.28 (which has included two notice and comment periods on the GCT credit regulation), the Sentencing Commission has never questioned the BOP's approach. Id. at A15.

In any event, the court of appeals correctly held that "the BOP is the agency charged with interpreting the good time credit statute." Tablada App. A15. As this Court has recognized, "[a]fter a district court sentences a federal offender, the Attorney General, through the Bureau of Prisons, has the responsibility of administering the sentence." United States v. Wilson, 503 U.S. 329, 334-335 (1992); see 18 U.S.C. 3612(a). That responsibility includes the authority to interpret Section 3624(b)(1). See, e.g., White, 390 F.3d at 1001 ("The Bureau's discretion to resolve ambiguities in the good-time statute is implicit in its statutory authority to determine and award good time and release prisoners when their sentences, as adjusted by the Bureau for good-time credit, have expired."). Thus, whatever the Sentencing Commission's understanding of Section 3624(b)(1), that

understanding does not control how the BOP interprets and administers the statute. Petitioners do not point to any decision holding to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

Nos. 08-11034, 09-5201

IN THE SUPREME COURT
OF THE UNITED STATES

ISMAEL TABLADA, Petitioner,

v.

J. E. THOMAS, Warden, FCI Sheridan, Respondent

MICHAEL GARY BARBER and TAHIR JIHAD-BLACK, Petitioners,

v.

J. E. THOMAS, Warden, FCI Sheridan, Respondent

On Petitions For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

Page

Introduction 1

A. These Cases Present Important And Well-Developed Issues Of Statutory Construction, Not The Administrative Method For Implementing The Statute 2

B. The Circuits Are In Disarray Regarding The Approach To The Statutory Construction Of The Good Time Credit Provision 4

C. To The Extent The Statute Is Ambiguous, The Sentencing Commission Received An Express Delegation Of Authority To Interpret The Statute And Acted on the Delegation By Using The 85% Rule 7

D. The Government's Claims Regarding *Skidmore* Deference Are Contradicted By The Utter Lack Of Reasoning From The Agency As Well As This Court's Settled Precedent Regarding The Rule Of Lenity 9

E. None Of The Petitioners' Cases Are Moot 11

Conclusion 12

Certificate of Service and Mailing

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Arrington v. Daniels,
516 F.3d 1106 (9th Cir. 2008) 11

Burkey v. Marberry,
556 F.3d 142 (3d Cir.), *cert. denied*, 2009 WL 1402275 (U.S. Oct. 20, 2009) .. 12

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 4, 6, 7

Crandon v. United States,
494 U.S. 152 (1990) 6

Dolfi v. Pontesso,
156 F.3d 696 (6th Cir. 1998) 6

Evans v. United States Parole Commission,
78 F.3d 262 (7th Cir. 1996) 6

Gonzalez v. Oregon,
546 U.S. 243 (2006) 9

Gunderson v. Hood,
268 F.3d 1149 (9th Cir.2001) 11

Lynce v. Mathis,
519 U.S. 433 (1997) 5

Mistretta v. United States,
488 U.S. 361 (1989) 9

Moreland v. Federal Bureau of Prisons,
126 S. Ct. 1906 (2006) 2, 3

Moreland v. Federal Bureau of Prisons,
431 F.3d 180 (5th Cir. 2005) 4, 5

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 11

Pacheco-Camacho v. Hood,
272 F.3d 1266 (9th Cir. 2001) 6

Paulsen v. Daniels,
413 F.3d 999 (9th Cir. 2005) 11

Perez-Olivo v. Chavez,
394 F.3d 45 (1st Cir. 2005) 5

Reno v. Koray,
515 U.S. 50 (1995) 10

Sash v. Zenk,
428 F.3d 132 (2d Cir. 2005) 5

Serrato v. Clark,
486 F.3d 560 (9th Cir. 2007) 11

Tablada v. Thomas,
533 F.3d 800 (9th Cir. 2008) 11

United States v. Johnson,
529 U.S. 53 (2000) 11

United States v. R.L.C.,
503 U.S. 291 (1992) 7

United States v. Wilson,
503 U.S. 329 (1992) 9

Weaver v. Graham,
450 U.S. 24 (1981) 5

Williams v. Lamanna,
20 F.Appx 360 (6th Cir. 2001) 5

Wolff v. McDonnell,
418 U.S. 539 (1974) 5

Wright v. Federal Bureau of Prisons,
451 F.3d 1231 (10th Cir. 2006) 5

FEDERAL STATUTES AND GUIDELINES

18 U.S.C. § 3583(e) 11

18 U.S.C. § 3624(b) 2

28 C.F.R. 523.20(a) 8

U.S.S.G. ch. 1 8

MISCELLANEOUS

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) 8

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On Petitions For Writ Of Certiorari To
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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Introduction

The government's opposition leaves uncontested a number of factors that strongly support a grant of certiorari to review a published decision that so far departs from this Court's precedents as to call for the Court to exercise its supervisory power:

- All previous reviews of the 54 days credit for good time in 18 U.S.C. § 3624(b) have depended on deference to a regulation now found to be invalid;

- The Bureau of Prisons never exercised any judgment or discretion regarding the proper reading of the statute because the agency – erroneously – believed it to unambiguously limit good time credit to 47 days for every year of the sentence imposed;

- The BOP interpretation raises an issue of unprecedented importance because the "somewhat less" good time credits (Opp. at 4) have the cumulative effect of 36,000 years over-incarceration, at the cost of almost $1 billion, in a dangerously overcrowded federal prison system.

The government's affirmative positions fail to address the unresolved issues of statutory interpretation that only this Court is in a position to effectively resolve.

A. These Cases Present Important And Well-Developed Issues Of Statutory Construction, Not The Administrative Method For Implementing The Statute.

The questions presented are whether the statute has an unambiguous meaning and, if ambiguous, whether the rule of lenity and deference to the Sentencing Commission require the petitioners' reading of the statute. The government's opposition skirts the question of whether the statute is ambiguous, claiming the BOP's interpretation is "consistent" with the statute, and mischaracterizes the prisoners' claims as relating to methodology and how the statute is administered. Opp. 4 & n.1.

The government does not and cannot contradict the petitioners' application of this Court's rules of statutory construction: "[B]oth the text and history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed." *Moreland v. Fed. Bureau of Prisons*, 126 S.Ct. 1906,

1907 (2006) (Stevens, J., statement respecting denial of certiorari). Now that the administrative record has been established through the "further study" recommended by Justice Stevens (*id.*), the prisoners have met the Rule 10 standards by demonstrating that courts of appeals drastically departed from this Court's statutory construction precedents and that the courts of appeals are in conflict.

By failing to separately address statutory construction, the government attempts to blur the clean issues that only this Court can now resolve. The government incorrectly characterizes the claims as relating to when and how the credits are given. Opp. 4 n.1. On the contrary, the petitioners do not care how the statute – properly construed – is put into effect. If the BOP administers the statute to require the statutory minimum service of 85% against the sentence – not the current 87.2% of the sentence imposed – the micro-administration is properly the agency's call. But the construction of the statute to assure the full 54 days against the sentence imposed is a purely judicial function that only this Court has the expertise and national authority to finally resolve.

The government offers no alternative statutory construction to contradict the petitioners' positions, which are all supported by this Court's precedent: "term of imprisonment" plainly means the term imposed by the judge; the rule of intra-statutory consistency requires that "term of imprisonment" mean the same thing in the same statutory sentence; throughout the sentencing statutes and Guidelines, "term of imprisonment" always means the same thing; and the history of the statute demonstrates Congress's intent that "term

of imprisonment" means the sentence imposed. Petition at 15-23. However, the government does make an important error in the description of the statute, incorrectly stating that prisoners only receive good time credit after serving a full year of incarceration. Opp. 3-4.

Even under the BOP's methodology, prisoners serving a year and a day sentences earn good time before they have served a full year. Appendix at 46 ("[T]he very shortest sentence that can be awarded GCT is a sentence of 1 year and 1 day.").[1] This fact is significant because the BOP has conceded that prisoners with a "term of imprisonment" of a year and a day are eligible for good time. Therefore, as stated in the petition at page 17-18, the Ninth Circuit's opinion radically departs from the Court's rule of intra-statutory consistency by treating the same term differently in the same sentence.

B. The Circuits Are In Disarray Regarding The Approach To The Statutory Construction Of The Good Time Credit Provision.

The government's brief suggests that the Circuits have adopted a uniform approach. Opp. 4-5. On the contrary, the Circuits are split on several fundamental aspects of statutory analysis: whether there is ambiguity; whether the statute is penal; and whether the rule of lenity trumps agency deference. For example, the *Moreland* two-judge court of appeals majority found the statute to be unambiguous,[2] but the other Circuits and the *Moreland*

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[1] This statement is followed by a complicated eight-step mathematical formula to arrive at the conclusion that "319 days actually served plus 47 days of GCT equals 366 days, or a sentence of 1 year and 1 day." *Id.* at 47-48.

[2] "Because we conclude the statute is unambiguous, we do not address whether the rule of lenity applies or whether the Federal Bureau of Prisons' interpretation of the statute must be accorded deference under *Chevron*." *Moreland v. Federal Bureau of Prisons*, 431

dissenter, for a variety of reasons, found ambiguity (and the *Moreland* District Court found the statute unambiguous the other way). The government does not even now assert whether it believes the statute to be ambiguous or unambiguous.

There is also a split on whether the good time credit statute is penal. This Court has held that good time reduction statutes are penal because they affect the quantum of punishment – the time actually served by the prisoner. *Lynce v. Mathis*, 519 U.S. 433, 440 n.12 (1997); *see Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (statutory good time statute created liberty interest under the Due Process Clause).[3] Nevertheless, several courts refused to apply the rule of lenity to the federal good time statute by claiming it is not penal. One court read the statute as merely an "administrative tool, rather than a punitive measure;"[4] another asserted "the BOP's calculation of reductions in a sentence for GCT, which is not, strictly speaking, a 'criminal' statute, and thus we do not believe the rule of lenity would apply."[5]

F.3d 180, 181-82 (5th Cir. 2005); *see also Williams v. Lamanna*, 20 F.Appx 360, 361 (6th Cir. 2001).

[3] *See also Weaver v. Graham*, 450 U.S. 24, 32 (1981) (good time statute penal for ex post facto purposes because "it in fact is one determinant of petitioner's prison term – and [ ] his effective sentence is altered once that determinant is changed.").

[4] *Wright v. Federal Bureau of Prisons*, 451 F.3d 1231, 1236 (10th Cir. 2006).

[5] *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005); *accord Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005).

Other courts have recognized that the good time statutes are penal, but held that lenity did not apply because ambiguity was resolved by *Chevron* deference.[6] Those courts are also in conflict with the Sixth and Seventh Circuit parole cases that, following Justice Scalia's concurrence in *Crandon*, state that any ambiguity in a penal statute cannot be construed with deference to an Executive agency without "turning the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity."[7] And now there is a Circuit split because the Ninth Circuit has found in the present case that the regulation to which the other Circuits deferred is invalid.

The government claims the courts of appeals have rejected the statutory arguments. Opp. at 9 n. 3. This claim is incorrect. Once the initial decision deferred to the agency, the courts followed the lead with little independent statutory construction. As the *Pacheco-Camacho* court incorrectly stated, deference to the agency made unnecessary a "fresh interpretation of the statute." 272 F.3d at 1271-72. The courts that conducted rigorous statutory construction were the district courts that found the statute unambiguously required a maximum of 54 days good time credit against the sentence imposed. By deferring to the agency before applying the Court's rules of construction, the courts following *Pacheco-Camacho* repeatedly departed from this Court's precedent on agency interpretation of

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[6] This has been the reasoning of the cases following the Ninth Circuit's initial position in *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001).

[7] *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (citing *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring); *Evans v. United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996).

statutes. Starting with footnote 9 of *Chevron*, this Court has consistently required full application of the rules of statutory construction before any deference to an agency. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).[8]

Resolution of these fractured cases by an authoritative decision by this Court is necessary to maintain the primacy of its precedent that is being ignored in these cases. Instead of the simple lines of construction flowing from this Court's precedent, the Circuits have created aberrational doctrines and unwarranted hurdles to the efforts of prisoners to vindicate their interests in penal statutes. The important federal questions should be addressed uniformly throughout the country consistently with this Court's precedent.

C. To The Extent The Statute Is Ambiguous, The Sentencing Commission Received An Express Delegation Of Authority To Interpret The Statute And Acted on the Delegation By Using The 85% Rule.

The government does not controvert the petitioners' assertion that Congress delegated to the Sentencing Commission the implementation of the Sentencing Reform Act. However, the government claims that the Sentencing Commission does not "actually disagree[]" with the BOP's different interpretation of the statute. Opp. at 11. There is no evidence to support this claim.

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[8] "If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect" (emphasis added). The rule of lenity is one of the "venerable" rules of construction that must be applied. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

On the contrary, the Sentencing Commission expressly calibrated the Sentencing Table to require higher sentences based on the "good time (resulting in early release) that *would be earned* under the guidelines." United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) (emphasis added). The government admits that the Sentencing Commission's construction requiring 85% of the sentence imposed pre-dated the BOP's erroneous memorandum based on a supposedly unambiguous requirement of serving 87.2% of the sentence imposed. Opp. at 11. The government ignores that, in 1990, the Sentencing Commission reiterated its interpretation in the Guidelines Manual, stating that "the sentence imposed by the court [is] the sentence the offender will serve, less approximately fifteen percent for good behavior." U.S.S.G. ch. 1, pt. A, ¶ 3 (2008 Guidelines Manual at 3). The Sentencing Commission has never agreed to the BOP misinterpretation.

The Sentencing Commission's silence does not mean agreement with the BOP because the BOP never provided notice that it was adopting a different interpretation of the statute. No inference can reasonably be drawn from silence when, due to the BOP's own failure to provide meaningful notice of its actions, the Sentencing Commission never had the occasion to disagree. This is especially true where the regulation simply said prisoners receive 54 days of good time credit "for each year served." 28 C.F.R. 523.20(a). The regulation is reasonably read as providing 54 days credit for every year served of the sentence imposed. Only in the internal program statements that instruct staff is the differentiation

between actual time served and the sentence imposed spelled out. Appendix at 49 ("It is essential to learn that GCT is not awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served.") (underlined in original).

There is simply no authority supporting the claim that the BOP is "the agency charged with interpreting the good time statute." Opp. at 11. On the contrary, this Court has held that Congress delegated to the Sentencing Commission implementation of the Sentencing Reform Act, of which the good time credit statute is an important part, by promulgating sentence guidelines and periodically reviewing and revising them. *Mistretta v. United States*, 488 U.S. 361, 369 (1989). As this Court held in *Gonzalez v. Oregon*, delegations to agencies must be express and direct, not assumed or implicit. 546 U.S. 243, 255-58 (2006). Where Congress delegated to the Sentencing Commission the task of determining the quantum of punishment, and that punishment is based on 15% good time credit, the BOP's authority is limited to administering the statute, not interpreting it to require more time in prison. *United States v. Wilson*, 503 U.S. 329, 335 (1992) (the BOP "has the responsibility for *administering* the sentence") (emphasis added).

D. The Government's Claims Regarding *Skidmore* Deference Are Contradicted By The Utter Lack Of Reasoning From The Agency As Well As This Court's Settled Precedent Regarding The Rule Of Lenity.

For the first time in a decade of litigation, the BOP conceded in this case the invalidity of the regulation upon which it repeatedly relied. The government claims the methodology is "persuasive and reasonable" but fails to show support in the statute and cites to no

reasoning supporting the harsher of two possible readings of the statute. The BOP made a legal error in concluding no discretion existed except to allow only 47 days against the sentence imposed. The administrative record in this case, as well as the concession regarding the invalidity of the regulation, establishes the lack of any rationale to which to defer.

The government miscites *Reno v. Koray* as rejecting application of the rule of lenity in favor of deference. 515 U.S. 50 (1995). First, this Court held in *Koray* that the relevant statute was unambiguous when read in context, and, therefore, the rule of lenity did not apply. 515 U.S. at 65.[9] Second, the Court only allowed "some" deference based on the rationale for the interpretation of the statute – that a pretrial halfway house had fewer indicia of incarceration and so should not be considered detention. In the present case, no rationale was provided. *Compare* Appendix at 31 (BOP concession that "it failed to articulate in the administrative record the rationale upon which it relied when it promulgated the good time regulation") *with Koray*, 515 U.S. at 61 n.4 (setting out agency reasoning on why release to a halfway house is not "official detention"). Third, the Court in *Koray*, unlike the Ninth Circuit, conducted traditional construction of the text, structure, and history of the statute – the comment regarding the agency deference only noted that the Program Statement reflected "the most natural and reasonable reading." 515 U.S. at 61.

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[9] "The rule of lenity applies only if, 'after seizing everything from which aid can be derived' . . . we 'can make no more than a guess as to what Congress intended.' That is not this case." (Citations omitted).

In contrast the text, context, and history of the good time credit statute support the petitioners' reading. If not unambiguously permitting 15% good time credits against the sentence imposed, the statute is at least sufficiently ambiguous that the rule of lenity would be applied to remove any ambiguity. *Skidmore* deference does not apply to an informal agency statement, based on an erroneous understanding of the statute, that includes no rationale for its interpretation.

E. None Of The Petitioners' Cases Are Moot.

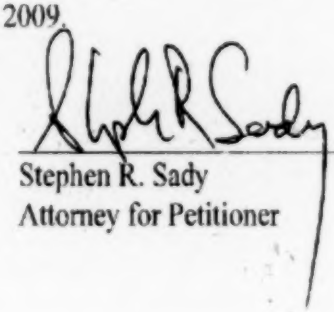
The government acknowledges that two petitioners have ripe claims but asserts that Mr. Tablada's case is moot because he is on supervised release. The Ninth Circuit held that Mr. Tablada's case was not rendered moot by the commencement of supervised release. *Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008). This Court's decision in *United States v. Johnson* recognized that over-incarceration resulted in "equitable considerations of great weight" that defeated claims of mootness for a person whose term of supervised release could be shortened, modified, or terminated under 18 U.S.C. § 3583(e). 529 U.S. 53, 60 (2000). The Ninth Circuit has well-developed precedent based in *Johnson*'s reasoning that has allowed prisoners to establish their over-incarceration in the proper forum, which can later result in a remedy implemented by the sentencing judge. *Tablada, supra*; *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007); *Mujahid v. Daniels*, 413 F.3d 991, 994- 95 (9th Cir. 2005); *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005); *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir.2001).

Although the Third Circuit's decision in *Burkey v. Marberry*, 556 F.3d 142, 149 (3d Cir.), *cert. denied*, 2009 WL 1402275 (U.S. Oct. 20, 2009), disagrees with this line of cases, the case is not moot as to Mr. Tablada.

Conclusion

For the foregoing reasons and those stated in the petition for certiorari and the amicus curiae brief in support of the petition, this Court should grant a writ of certiorari.

Dated this 6th day of November, 2009.



Stephen R. Sady
Attorney for Petitioner

Nos. 08-11034, 09-5201

IN THE SUPREME COURT
OF THE UNITED STATES

ISMAEL TABLADA, Petitioner

v.

J. E. THOMAS, Warden, FCI Sheridan, Respondent

MICHAEL GARY BARBER, ET AL., Petitioners

v.

J. E. THOMAS, Warden, FCI Sheridan, Respondent

On Petitions For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within Reply to Brief for the United States in Opposition on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon on November 6, 2009, first class postage prepaid, an exact and full copy thereof addressed to:

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Dated this 6th day of November, 2009.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 6th day of November, 2009.

Notary Public of Oregon

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AMICUS CURIAE BRIEF

134

Nos. 08-11034, 09-5201

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IN THE

Supreme Court of the United States

ISMAEL TABLADA,

Petitioner,

v.

J.E. THOMAS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN THE UNITED STATES, FAMILIES AGAINST MANDATORY MINIMUMS, PRISON FELLOWSHIP MINISTRIES AND DEAN ERWIN CHEMERINSKY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

As shown by the petition for a writ of certiorari in this matter, 18 U.S.C. § 3624(b) unambiguously provides that prisoners can receive credit for good conduct ranging up to 54 days per year of the sentence imposed, notwithstanding the Bureau of Prisons' determination that such calculations shall be based on the time served.

If the Court nonetheless determines that § 3624(b) is ambiguous, a writ of certiorari should be granted to resolve the following questions:

1. Whether a statute governing the duration of imprisonment is a penal statute, such that it must be construed subject to the rule of lenity?

2. Whether the rule of lenity precludes deference to an agency interpretation of an ambiguous penal statute?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
ARGUMENT	6
I. THE CIRCUITS ARE SPLIT ON WHETHER § 3624(b) IS A PENAL STATUTE SUBJECT TO THE RULE OF LENITY	6
II. THE CIRCUITS ARE SPLIT ON WHETHER THE RULE OF LENITY PRECLUDES AGENCY DEFERENCE	9
III. UNDER THIS COURT'S JURISPRUDENCE, THE RULE OF LENITY PRECLUDES RESOLUTION OF AMBIGUITY IN A PENAL STATUTE VIA AGENCY DEFERENCE	11
A. The Rule of Lenity is a Canon of Statutory Construction that Takes Precedence Over Deference in Resolving Ambiguity	11
B. The Fundamental Values Underlying Lenity Override the Rationales for Administrative Deference	12
CONCLUSION	20
APPENDIX, List of Federal Public and Community Defenders Joining as *Amici Curiae*	1a

TABLE OF AUTHORITIES

CASES — Page

Babbitt v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) 16, 17
Bernitt v. *Martinez*, 432 F.3d 868 (8th Cir. 2005) 4, 7, 9
Bifulco v. *United States*, 447 U.S. 381 (1980) 4, 7
Brown v. *McFadden*, 416 F.3d 1271 (11th Cir. 2005) 4
Busic v. *United States*, 446 U.S. 398 (1980) 11
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 11, 12, 14
Crandon v. *United States*, 494 U.S. 152 (1990) 6, 13, 18
Dolfi v. *Pontesso*, 156 F.3d 696 (6th Cir. 1998) 5, 9, 10
Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 12
EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991) 6
Evans v. *United States Parole Comm'n*, 78 F.3d 262 (7th Cir. 1996) 18, 19
Gonzales v. *Oregon*, 546 U.S. 243 (2006) 18
Huntington v. *Attrill*, 146 U.S. 657 (1892) .. 7
INS v. *St. Cyr*, 533 U.S. 289 (2001) 12
Krugh v. *Miehle Co.*, 503 F.2d 121 (6th Cir. 1974) 7, 8
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 4, 12
Lopez v. *Davis*, 531 U.S. 230 (2001) 18
Lynce v. *Mathis*, 519 U.S. 433 (1997) 8
Moreland v. *Fed. Bureau of Prisons*, 431 F.3d 180 (5th Cir. 2005) 4

TABLE OF AUTHORITIES—continued

Page

Moreland v. *Fed. Bureau of Prisons*, 547 U.S. 1106 (2006) 4

Mourning v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973) 8

Mujahid v. *Daniels*, 413 F.3d 991 (9th Cir. 2005) 4, 7

Nat'l Cable & Telecomms. Ass'n, Inc. v. *Gulf Power Co.*, 534 U.S. 327 (2002) 14

Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 16

NLRB v. *Okla. Fixture Co.*, 332 F.3d 1284 (10th Cir. 2003) 5, 10, 11

O'Donald v. *Johns*, 402 F.3d 172 (3d Cir. 2005) 4, 7, 9

Pacheco-Camacho v. *Hood*, 272 F.3d 1266 (9th Cir. 2001) 4, 5, 6, 9

Perez-Olivo v. *Chavez*, 394 F.3d 45 (lst Cir. 2005) 4, 7, 9

Reno v. *Koray*, 515 U.S. 50 (1995) 15, 16

Sash v. *Zenk*, 428 F.3d 132 (2d Cir. 2005) .. 4, 7

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 14

Solid Waste Agency v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) 12

United States v. *Bass*, 404 U.S. 336 (1971) 13, 14, 17

United States v. *Granderson*, 511 U.S. 39 (1994) 8

United States v. *Lanier*, 520 U.S. 259 (1997) 11

United States v. *McGoff*, 831 F.2d 1071 (D.C. Cir. 1987) 10

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 14, 15

TABLE OF AUTHORITIES—continued

Page

United States v. *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006) 10

United States v. *R.L.C.*, 503 U.S. 291 (1992) 7, 13

United States v. *Santos*, 128 S. Ct. 2020 (2008) 13

United States v. *Wilson*, 503 U.S. 329 (1992) 17

White v. *Scibana*, 390 F.3d 997 (7th Cir. 2004) 4

Williams v. *Lamanna*, 20 F. App'x 360 (6th Cir. 2001) 4, 10

Yi v. *Fed. Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005) 4, 7, 9

STATUTES

18 U.S.C. § 3624(b) ..... *passim*

§ 4001(a) 19

§ 4001(b)(1) 17, 19

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus curiae, the National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Amici curiae, Federal Public and Community Defenders in the United States (not including the Federal Defender representing the petitioner in this matter), have offices in nearly all federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. These *amici* are listed in the Appendix hereto.

Amicus curiae, Families Against Mandatory Minimums ("FAMM"), is a national, nonprofit, nonpartisan organization of 20,000 members founded in 1991. FAMM's primary mission is to promote fair

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory-sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through *amicus* filings in important cases.

Amicus curiae, Prison Fellowship Ministries ("PFM"), is a tax-exempt, charitable religious organization, founded in 1976 and currently operating in every state. PFM ministers to all those impacted by crime: prisoners, ex-prisoners, crime victims, and their families. It offers seminars in the tenets of Christianity and such practical skills as how to be a good father and an honest employee, organizes local churches to provide gifts to prisoners' children, and matches inmates with Christian mentors to help them during the difficult transition from prison to freedom. PFM advocates placing offenders in halfway houses at the earliest possible moment so that they can be close to their families and mentors, seek employment, obtain state IDs and undertake other tasks that are almost impossible to accomplish from inside prison.

Amicus curiae, Dean Erwin Chemerinsky, is the founding Dean of the University of California—Irvine School of Law. Dean Chemerinsky has a longstanding commitment to criminal justice issues, including those related to criminal defendants' periods of incarceration.

Amici appear in support of petitioner in this case because the decision below improperly permits incarceration of defendants convicted in federal

courts for periods longer than Congress intended. In particular, it is of great importance to *amici* and their clients that this Court correct the Ninth Circuit's error of deferring to an executive agency's construction of a penal statute. Such deference conflicts with the rule of lenity by allowing the government to impose punishment for which inadequate notice has been given and by enabling an agent of the Attorney General to order punishment that exceeds that permitted by law.

REASONS FOR GRANTING THE PETITION

In enacting 18 U.S.C. § 3624(b), Congress plainly provided that federal prisoners exhibiting good conduct may have their term of imprisonment shortened by 54 days per year of the total sentence imposed. See Pet. 14-16. Yet the court below deferred to an informal interpretation of that statute by the Bureau of Prisons ("BOP") that effectively reduces such good time credit ("GTC") to 47 days per year. See *id.* at 7-8. In doing so, the Ninth Circuit joined other circuits in erroneously approving the BOP's GTC methodology, which costs taxpayers nearly $1 billion to incarcerate federal prisoners longer than Congress prescribed, and serves improperly to deprive current prisoners of 36,000 years of liberty. See *id.* at 10-11.

Moreover, the ruling below deepened multiple well-established splits among the circuits about (1) whether § 3624(b) is ambiguous; (2) whether it is a penal statute to which the rule of lenity must be applied; and, more generally, (3) whether the rule of lenity requires courts to resolve ambiguities in penal statutes in the manner most favorable to the defendant or prisoner, without affording any deference to a contrary agency interpretation. A writ

of certiorari is warranted to resolve the circuits' inconsistent treatment of these important issues.

Accepting *arguendo* that § 3624(b) is ambiguous,[2] the rule of lenity constrains courts "to interpret any ambiguity in [a penal] statute in [the defendant's] favor." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). The circuits have split on the question of whether § 3624(b) is a penal statute, notwithstanding this Court's precedent providing that the rule of lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Clarity is needed as to whether

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[2] Justice Stevens has concluded that "both the text and the history of [§ 3624(b)] strongly suggest" that Congress plainly provided that GTC be based on the "sentence imposed," not the "time served," thereby rejecting the statutory interpretation underlying the shorter GTC period employed by the BOP and challenged in this suit. *Moreland* v. *Fed. Bureau of Prisons*, 547 U.S. 1106, 1106 (2006) (Stevens, J., statement respecting denial of petitions for a writ of certiorari). The Fifth and Sixth Circuits, by contrast, have held that the statute unambiguously requires that GTC be calculated based upon "time served," not the court-imposed sentence. *See Moreland* v. *Fed. Bureau of Prisons*, 431 F.3d 180, 181-82 (5th Cir. 2005); *Williams* v. *Lamanna*, 20 F. App'x 360, 361 (6th Cir. 2001). Every other circuit to reach the question has deemed the statute ambiguous. *See Perez-Olivo* v. *Chavez*, 394 F.3d 45, 47 (1st Cir. 2005); *Sash* v. *Zenk*, 428 F.3d 132, 134 (2d Cir. 2005); *O'Donald* v. *Johns*, 402 F.3d 172, 173-74 (3d Cir. 2005) (per curiam); *Yi* v. *Fed. Bureau of Prisons*, 412 F.3d 526, 532-34 (4th Cir. 2005); *White* v. *Scibana*, 390 F.3d 997, 1002-03 (7th Cir. 2004); *Bernitt* v. *Martinez*, 432 F.3d 868, 869 (8th Cir. 2005) (per curiam); *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001); *Mujahid* v. *Daniels*, 413 F.3d 991, 999 (9th Cir. 2005); *Brown* v. *McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005) (per curiam). *Amici* concur in Justice Stevens' construction of § 3624(b), and like Petitioner, do not deem the statute to be ambiguous. *See* Pet. 14-22.

§ 3624(b) must be construed pursuant to the rule of lenity, since application of the rule would affect the release dates of many prisoners, thereby reinstating their liberty on the timetable Congress intended and saving the federal Treasury substantial sums.

The courts of appeals disagree also on the related issue of whether, and if so how, a court may defer to an agency interpretation of a penal statute. The court below disregarded petitioner's lenity argument and followed a prior circuit decision that held—like several other circuits—that agency deference principles override the rule of lenity. *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001). By contrast, the Sixth Circuit has recognized that lenity resolves any statutory ambiguity as a threshold matter, leaving no ambiguity and thus precluding deference to agency views. *Dolfi* v. *Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998). The Tenth Circuit, meanwhile, has taken a compromise position, allowing "some" deference to an agency interpretation, but requiring that the interpretation accord with "interpretive norms regarding criminal statutes." *NLRB* v. *Okla. Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc). Because this circuit split is well developed and likely dispositive of the GTC issue presented here, this case presents an apt vehicle for clarifying how agency deference jurisprudence and lenity interact.

Moreover, a writ of certiorari is warranted in order to preserve the important principles underlying the rule of lenity: legislative supremacy in defining penal laws, and the fundamental fairness requirement of clear notice. Lenity stands in irreconcilable tension with deference to an agency where inadequate notice was provided and an agency, rather than Congress, has defined the sentencing laws.

Finally, deference to an agency's construction of a penal statute is especially inappropriate when the agency answers to the Attorney General. Although the BOP has been delegated power to manage prison affairs, that delegation does not encompass reinterpreting Congressional enactments on the duration of nearly all federal prisoners' incarceration. Despite the BOP's lack of any specialized expertise in statutory construction or a clear delegation for the BOP to construe § 3624(b), the court below deferred to the informal, counter-textual, and ahistorical interpretation of a penal statute by the Attorney General's agent. This is not deference but "abdication." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Deference to the prosecution to determine criminal incarceration periods "turn[s] the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon* v. *United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring). Accordingly, for these reasons and those stated in the Petition, this Court should grant a writ of certiorari and reverse the court below.

ARGUMENT

I. THE CIRCUITS ARE SPLIT ON WHETHER § 3624(b) IS A PENAL STATUTE SUBJECT TO THE RULE OF LENITY.

The courts of appeals have disagreed on whether lenity applies to § 3624(b). Although the court below failed to address petitioner's argument that lenity applied, the Ninth Circuit had previously applied lenity to § 3624(b). *Pacheco-Camacho*, 272 F.3d at 1271. Indeed, the majority of circuits to consider lenity's application to § 3624(b) have accepted that it

is a penal statute subject to lenity.[3] The Second Circuit, by contrast, has held that lenity is irrelevant "[b]ecause § 3624(b) is not a criminal statute . . . ." *Sash* v. *Zenk*, 428 F.3d 132, 134 (2d Cir. 2005). See also *Perez-Olivo* v. *Chavez*, 394 F.3d 45, 53 (1st Cir. 2005) (§ 3624(b) "is not, strictly speaking, a 'criminal' statute"). This Court should grant a writ of certiorari to resolve this split of authority by clarifying that § 3624(b) is indeed a penal statute subject to the rule of lenity.

As this Court has recognized, the rule of lenity applies to statutes prescribing criminal penalties. *Bifulco*, 447 U.S. at 387 (invoking lenity to resolve doubts in defendant's favor about Congress's intent to impose a special parole term); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality) (lenity should resolve any ambiguity "about the severity of sentencing"); *id.* at 307-11 (Scalia, J., concurring, joined by Kennedy, J., and Thomas, J.) (agreeing that lenity should apply to the sentencing statutes but arguing that courts cannot use legislative history to resolve textual ambiguity to the detriment of a criminal defendant). At base, "[t]he test whether a law is penal . . . is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Huntington* v. *Attrill*, 146 U.S. 657, 668 (1892). Thus, courts have found statutes to be penal and have applied the rule of lenity even in the context of seemingly benign regulatory statutes, such as one requiring proper machine safeguards, if the statutes subject violators to fines or the loss of use of a machine. *Krugh* v. *Miehle Co.*, 503 F.2d 121, 125 (6th

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[3] *See O'Donald*, 402 F.3d at 173-74; *Bernitt*, 432 F.3d at 869; *Mujahid*, 413 F.3d at 999; *see also Yi*, 412 F.3d at 535 n.6 (assuming, but not deciding, "that 18 U.S.C. § 3624 is a 'criminal statute' in whose context the rule is properly invoked").

Cir. 1974). It follows a fortiori that § 3624(b) is a penal statute, because it defines the minimum time defendants must serve in prison if convicted. See *Lynce* v. *Mathis*, 519 U.S. 433, 440 n.12, 445-46 (1997) (recognizing that statutes governing parole and the award of good-behavior credits are penal, just like statutes that govern initial sentencing, because they affect the duration of imprisonment) (citing *Weaver* v. *Graham*, 450 U.S. 24, 32 (1981)).

Once a court determines that a statute such as § 3624(b) is penal, it must, if its interpretation of the statute reveals an ambiguity, "apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (adopting interpretation of statutory minimum sentence that was more favorable to defendant because the "text, structure, and history fail to establish that the Government's position is unambiguously correct").

Yet in this case alone, deference to the BOP's interpretation of § 3624(b) validated the incarceration of Mr. Tablada for 141 days longer than Congress intended, despite the plain meaning of the statute, its legislative history, and the requirements of lenity. See Pet. 9, 14-30. Across all current prisoners, the BOP has rewritten the sentencing laws to require 36,000 years of collective incarceration that Congress did not prescribe. See *id.* at 10. This case requires the most forceful application of the lenity doctrine because the choice between the BOP's construction and that most favorable to prisoners means the difference between liberty and imprisonment. See *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 376 (1973) (holding that a law subjecting defendants to "modest" fines does not require the court to "construe [the statute] as narrowly as a criminal

statute providing graver penalties, such as prison terms"). A writ of certiorari is warranted to bring clarity to this important issue.

II. THE CIRCUITS ARE SPLIT ON WHETHER THE RULE OF LENITY PRECLUDES AGENCY DEFERENCE.

Statutory ambiguity is the prerequisite for invoking both the rule of lenity and agency deference principles, but the circuits have divided over which doctrine takes priority. Despite the requirement that courts construe penal statutes strictly against the government, in reviewing the BOP's interpretation of § 3624(b) the Ninth Circuit held that agency interpretations of ambiguous penal statutes receive deference. *Pacheco-Camacho*, 272 F.3d at 1271 (lenity "does not prevent an agency from resolving statutory ambiguity"). The First Circuit has similarly held that "the rule of lenity does not foreclose deference . . . ." *Perez-Olivo*, 394 F.3d at 53.[4]

In contrast, the Sixth Circuit has held that the "rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." *Dolfi*, 156 F.3d at 700 (quoting *United States* v. *Lanier*, 520 U.S. 259, 266 (1997)). In *Dolfi*, the court considered whether the Parole Commission could impose a more punitive "special parole" or if it was limited to sentences on normal parole terms under 21 U.S.C. § 841(c). *Id.* at 697. The court rejected the government's argument for deference to the Commission's interpretation of the ambiguous statute. Deference, the court reasoned, is only

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[4] Other circuits have likewise held that agency interpretations control even when lenity applies. *See O'Donald*, 402 F.3d at 174; *Yi*, 412 F.3d at 535 ("[d]eference trumps lenity"); *Bernitt*, 432 F.3d at 869.

appropriate "in a complex field of regulation with nuances perhaps unfamiliar to the federal courts [such as] environmental regulation or occupational safety." *Id.* at 700. The interpretation of penal statutes, by contrast, "is the bread and butter of the work of federal courts" and deserves no such deference. *Id.*[5] Thus, the court held that *Chevron* analysis did not apply to construction of an ambiguous penal statute. *Id.* (discussing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). See also *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (Starr, J.) (the rule of lenity renders the construction of a statute of limitations "far outside *Chevron* territory"). Even so, the Sixth Circuit has acknowledged that the degree of deference accorded to interpretations of criminal laws "is unsettled." *United States* v. *One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 420 (6th Cir. 2006); *id.* at 420 n.3 (citing the rule of lenity).

Taking an intermediate position, the Tenth Circuit has likewise recognized the conflict between agency deference and lenity and has incorporated lenity into its assessment of whether agency interpretations are reasonable at the second step of the *Chevron* analysis. *Okla. Fixture Co.*, 332 F.3d at 1287 & n.5. The en banc court held, in a divided decision, that an agency interpretation merited deference so long as it was reasonable and adhered to interpretive norms governing penal statutes, such as construing criminal statutes narrowly and interpreting their exceptions

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[5] The Sixth Circuit has nonetheless found that "term of imprisonment" in § 3624(b) unambiguously means time served. *Williams*, 20 F. App'x at 361. The court, in its unpublished decision, neither applied any canons of construction to reach that conclusion nor addressed the legislative history.

broadly. *Id.* (citing *United States* v. *Bass*, 404 U.S. 336 (1971)); but see *id.* at 1292 (Briscoe, J., concurring) (noting that lenity could apply at *Chevron* step one by construing broadly the statute's exceptions "to eliminate possible bases of criminal liability"). Still, the court confessed confusion, observing that "it is not entirely clear exactly how the *Chevron* analysis is affected by the presence of [a penal statute]." *Id.* at 1287.

Thus, the deference that the Ninth Circuit and others have accorded to the BOP's interpretation of § 3624(b) conflicts with the Tenth and Sixth Circuits' understandings of the relationship between agency deference and the rule of lenity. This Court should grant a writ of certiorari to end the confusion and clarify that lenity trumps deference.

III. UNDER THIS COURT'S JURISPRUDENCE, THE RULE OF LENITY PRECLUDES RESOLUTION OF AMBIGUITY IN A PENAL STATUTE VIA AGENCY DEFERENCE.

A. The Rule of Lenity is a Canon of Statutory Construction that Takes Precedence Over Deference in Resolving Ambiguity.

Deferring to an agency interpretation of any kind when the rule of lenity applies violates this Court's requirement that courts use all the "traditional tools of statutory construction" to first resolve ambiguity before considering deference. *Chevron*, 467 U.S. at 843 n.9. The "oft-cited rule" of lenity is such a "tool[] of statutory construction." *Busic* v. *United States*, 446 U.S. 398, 406-407 (1980). See also *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (noting that the "rule of lenity" is "the canon of strict construction of criminal statutes"). Of course, absent ambiguity,

there is no room for deference. *Chevron*, 467 U.S. at 842-43 & n.9. And where a penal statute is ambiguous, this Court has unanimously reiterated that it is "constrained to interpret any ambiguity in the statute in [the defendant's] favor." *Leocal*, 543 U.S. at 11 n.8.

On multiple occasions, this Court has held that statutory construction rules precede agency deference in resolving facial ambiguities. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), an agency had interpreted an otherwise ambiguous statute against an alien contrary to the "presumption against retroactive legislation." *Id.* at 316. The Court held that it can "only defer, however, to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *Id.* at 320 n.45 (internal quotation marks omitted). Deference, therefore, was inappropriate because the tools of statutory construction resolved any ambiguity as a threshold matter. *Id.*; see also *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (precluding deference based upon the canon of constitutional avoidance); *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (canon against "federal encroachment upon a traditional state power" displaces agency deference). As a similar canon, the rule of lenity resolves any ambiguities in a penal statute against the government, see *Leocal*, 543 U.S. at 11 n.8, thereby precluding agency deference.

B. The Fundamental Values Underlying Lenity Override the Rationales for Administrative Deference.

1. This Court has explained that two fundamental principles underlie the rule of lenity: legislative supremacy in defining penal laws and the

fundamental fairness requirement of clear notice. *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Only legislators may define the law of crime and punishment, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community." *Id.* Yet here, the BOP—an executive agency—has supplanted Congress's role. This conflicts with the legislative supremacy principle underlying the rule of lenity, which "places the weight of inertia upon the party that can best induce Congress to speak more clearly": the government, not the incarcerated defendant. *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality).

Likewise, lenity entitles all people to receive clear notice of criminal penalties "in language that the common world will understand." *Bass*, 404 U.S. at 348 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Thus, "it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon*, 494 U.S. at 160. At the time of Mr. Tablada's sentencing, the BOP's interpretation was contained in an internal memorandum that provided no notice whatsoever. And while the notion that statutes "give adequate notice to the citizen is something of a fiction, . . . necessary fiction descends to needless farce" when courts consider the BOP's obscure Program Statements sufficient notice. *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring) (it is absurd to premise fair notice on public knowledge of Congressional Committee Reports).

2. The traditional rationales for agency deference are inapplicable to this case and, to the extent that they might apply, conflict with the fundamental principles underlying the rule of lenity.

The court of appeals correctly recognized that *Chevron* deference was inapplicable to the BOP's interpretation. Pet. App. 9-11. The BOP relied on a Program Statement, which did "not purport to carry the force of law," *id.* at 10, and which was not even issued until after Mr. Tablada's sentencing.

Moreover, construction of § 3624(b) is not the type of technical issue on which an agency can offer unique expertise that justifies deference. See *Nat'l Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002) (noting, in telecommunications service pricing case, that agencies can as a "general rule . . . fill gaps where the statutes are silent" if the subject of the statute "is technical, complex, and dynamic"). Instead, the only question presented is a straightforward issue of statutory construction on which "[t]he judiciary is the final authority." *Chevron*, 467 U.S. at 843 n.9.

Yet, rather than fulfill its judicial duty to construe statutes, the court of appeals took the unprecedented step of deferring under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944). In so doing, the court simply presumed that any agency interpretation failing to merit *Chevron* deference is eligible for *Skidmore* respect. Pet. App. 9-11. That is wrong, for *Skidmore* deference applies in two specific circumstances that are fundamentally at odds with lenity.

First, *Skidmore* deference can apply to agency interpretations formed in the absence of a congressional grant of authority to bind parties with legal force. *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001). By definition, such agency interpretations of penal laws do not have the imprimatur of Congress, and therefore cannot command a court's deference. *Bass*, 404 U.S. at 348. Second, *Skidmore* deference can apply to

interpretations by agencies that, while possessing authority to act with legal force, established the interpretation through an informal action lacking the force of law. *Mead Corp.*, 533 U.S. at 226-27. Such interpretations typically are not widely published, nor do they result from notice-and-comment rulemaking. *Id.* at 226. Those informal interpretations thus cannot provide sufficient notice to justify the deprivation of liberty that accompanies penal statutes. Indeed, the BOP's interpretation at issue here appeared in an informal Program Statement. Pet. App. D. This Court should therefore intervene and make clear that lenity always precludes *Skidmore* deference.

Further, even if *Skidmore* deference could coincide with the rule of lenity, such deference should not be accorded to the BOP's Program Statement. This Court has explained that *Skidmore* deference is warranted where an agency's conclusions are based on "specialized experience and broader investigations and information" that a court lacks. *Mead Corp.*, 533 U.S. at 234. Here, the BOP applied no special expertise, but simply declared that the statute unambiguously provides credit only for time served. See Pet. 6.[6]

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[6] Similarly, in *Reno* v. *Koray*, 515 U.S. 50 (1995), this Court did not accord traditional forms of deference to the BOP's view of whether a prisoner's time spent in a community treatment center while "released" on bail counted toward his time served. *See id.* at 61, 65. On the contrary, this Court construed the statute at issue in the same manner as the BOP only after the Court independently determined that that construction was prescribed by the statute's text, structure, and history. *Id.* at 59-61. Taken in context, then, the Court's suggestion that the BOP's interpretation was "entitled to some deference" meant simply that the interpretation matched the statute's unambiguous meaning. *Id.* at 61 (the BOP's understanding was

Moreover, rather than achieving consistency, as the court of appeals suggested, Pet. App. 13, the BOP broke with the decades-long practice of computing credits based on the sentence imposed. See Pet. 19-22 (tracing the history of good-time statutes from 1902 to the present). Of course, agencies are entitled to alter positions in light of new information and circumstances. See, *e.g.*, *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (allowing the FCC to reclassify cable modem services under *Chevron*). But a Congressional enactment establishing a minimum incarceration time is profoundly different than a law governing a complex and ever-changing field such as telecommunications technology.[7] The rule of lenity,

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"the most natural and reasonable reading"); *see also id.* at 62 (rejecting prisoner's reading not based on the agency's view, but "in light of the foregoing textual and historical analysis"). Accordingly, the Court declined to apply lenity, not out of deference to the BOP's position, but because the "statute [was] not 'ambiguous.'" *Id.* at 64-65 (citation omitted). *Koray* thus does not address the situation here, where the statute's plain meaning supports the prisoner's view, or is at least sufficiently ambiguous to warrant application of lenity, rather than according deference to agency views at the expense of prisoners.

[7] Indeed, this Court has only contemplated according traditional forms of deference to an agency construction of a penal statute when the agency acted pursuant to a clear congressional grant of "latitude" over a complex environmental protection scheme that demanded a high "degree of regulatory expertise." *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995). In contrast, § 3624(b) grants no agency latitude to interpret what Congress believed to be a clear-cut formula allowing 15% good-time credit. *See* Pet. 21-22 (listing statements of the law's authors describing the bill as requiring imprisonment for 85% of the sentence imposed). Nor does interpreting the statute require administrative expertise. But for the BOP's tortured interpretation necessitating pages of

not deference, provides the statutory consistency necessary for fair notice and, thus, effective deterrence in the law of crime and punishment.

3. In the case of a penal statute, deference to the BOP is especially inappropriate because it is an agent of the prosecutor, the Attorney General.

The justifications for deference are never more in conflict with the values underlying lenity than when an agency of the prosecuting authority interprets a law governing the duration of criminal incarceration. The BOP, a branch of the Department of Justice, is an inappropriate body to determine the extent of society's "moral condemnation." See *Bass*, 404 U.S. at 348. No agency can accumulate specialized knowledge or expertise in discerning the direction of society's moral compass; instead, elected representatives are the officials entrusted with this task in our republican form of government.

Justice Department interpretations of criminal statutes traditionally receive skepticism, not deference. Congress granted BOP the power to regulate prisons only as part of the broader delegation to the Attorney General of control of the prisons. See 18 U.S.C. § 4001(b)(1) (Attorney General controls prisons and may "promulgate rules for the government thereof"); *United States* v. *Wilson*, 503 U.S. 329, 331 (1992) (under 18 U.S.C. § 3621(a),

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calculations, implementing Section 3624(b) would require only simple math. In any event, the *Babbitt* Court ultimately declined to apply lenity because the petitioners challenged the regulation on its face, and thus *Babbitt* has no bearing on Petitioner's as-applied challenge here. *See Babbitt*, 515 U.S. at 704 n.18.

"[t]he Attorney General, through the [BOP], has responsibility for imprisoning federal offenders").[8]

While deference to the Attorney General in running the day-to-day affairs of prison facilities is unavoidable, the same authority that recommends sentences to the judiciary cannot also dictate the construction of statutes governing the duration of criminal incarceration. To allow this "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (1990) (Scalia, J., concurring). See also *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996) ("[W]e have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of

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[8] The only delegation to the BOP in the context of § 3624(b) is to determine *whether* prisoners have qualified for good-time credit, *not* to determine how much credit is permissible. Section 3624(b) explicitly conditions the award of good-time credit on the BOP's determination that the prisoner has "satisfactorily complied" with established expectations. Such a determination about a specific prisoner's conduct, which is based on a clear grant of authority from Congress and requires expertise in individualized evaluation of prisoners, could be entitled to deference. *See, e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 242, 244 (2001) (according deference to the BOP rulemaking establishing procedures for individualized inquiry regarding prisoner eligibility for a substance abuse program). But the BOP garners no deference particularly where, as here, determining Congress's intent requires none of the BOP's specialized expertise and the BOP has not been delegated the necessary interpretive authority. *See* Pet. 5-6, 27-30. *Cf. Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006) (denying *Skidmore* deference to Attorney General's legal conclusion where—as here—the Attorney General purported to establish an interpretation beyond his delegated power, "lack[ed] expertise in this area," and failed to engage in "reasoned" decisionmaking).

imprisonment; certainly judges do not defer to the Attorney General's interpretation of Title 18.").[9] Deference to the interpretation of the BOP on the required length of incarceration serves only improperly to enhance the typical imbalance of power at sentencing between the United States and criminal defendants.

This Court has never abandoned the broad principles that underlie the rule of lenity. Lenity is fundamentally irreconcilable with the rationales on which the various forms of administrative deference are based. The Court should clarify that the rule of lenity remains essential to the interpretation of laws determining prisoners' periods of incarceration. Executive branch agencies—in particular, agents of the Attorney General—have no appropriate role to play, and their views deserve no deference. This is particularly true where, as here, deferring to an executive agency's views results in such substantial, unauthorized burdens on the liberty of countless citizens and imposes massive, unauthorized costs upon society.

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[9] Indeed, the statutory provision providing the Attorney General with rulemaking authority for the management of prison affairs, 18 U.S.C. § 4001(b)(1), contrasts notably with the legislature's express requirement in the immediately-preceding subsection permitting only Congress itself to define the basis for imprisonment. *See id.* § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States *except pursuant to an Act of Congress.*" (emphasis added)).

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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David Beneman, Federal Public Defender, District of Maine

Miriam Conrad, Federal Public Defender, Districts of Massachusetts, New Hampshire and Rhode Island

Joseph C. Laws, Federal Public Defender, District of Puerto Rico

SECOND CIRCUIT:

Alexander Bunin, Federal Public Defender, Northern District of New York

Thomas G. Dennis, Federal Public Defender, District of Connecticut

Michael L. Desautels, Federal Public Defender, District of Vermont

Leonard F. Joy, Executive Director, Federal Defenders of New York, Inc., Eastern and Southern Districts of New York

Marianne Mariano, Federal Public Defender, Western District of New York

THIRD CIRCUIT:

Edson A. Bostic, Federal Public Defender, District of Delaware

Richard Coughlin, Federal Public Defender, District of New Jersey

Lisa B. Freeland, Federal Public Defender, Western District of Pennsylvania

Thurston T. McKelvin, Federal Public Defender, District of Virgin Islands

Leigh Skipper, Chief Federal Defender, Defender Association of Philadelphia, Eastern District of Pennsylvania

James V. Wade, Federal Public Defender, Middle District of Pennsylvania

FOURTH CIRCUIT:

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Brian J. Kornbrath, Federal Public Defender, Northern District of West Virginia

Thomas P. McNamara, Federal Public Defender, Eastern District of North Carolina

Michael S. Nachmanoff, Federal Public Defender, Eastern District of Virginia

Mary Lou Newberger, Federal Public Defender, Southern District of West Virginia

Claire Rauscher, Executive Director, Federal Defenders of Western North Carolina, Inc., Western District of North Carolina

Larry W. Shelton, Federal Public Defender, Western District of Virginia

Parks Nolan Small, Federal Public Defender, District of South Carolina

James Wyda, Federal Public Defender, District of Maryland

FIFTH CIRCUIT:

Richard A. Anderson, Federal Public Defender, Northern District of Texas

Henry J. Bemporad, Federal Public Defender, Western District of Texas

G. Patrick Black, Federal Public Defender, Eastern District of Texas

Rebecca L. Hudsmith, Federal Public Defender, Western District of Louisiana

Samuel Dennis Joiner, Federal Public Defender, Southern District of Mississippi

Marjorie A. Meyers, Federal Public Defender, Southern District of Texas

Virginia Schlueter, Federal Public Defender, Eastern District of Louisiana

SIXTH CIRCUIT:

Elizabeth Ford, Executive Director, Federal Defender Services of Eastern Tennessee, Inc., Eastern District of Tennessee

Ray Kent, Federal Public Defender, Western District of Michigan

Henry A. Martin, Federal Public Defender, Middle District of Tennessee

S. S. Nolder, Federal Public Defender, Southern District of Ohio

Stephen B. Shankman, Federal Public Defender, Western District of Tennessee

Miriam L. Siefer, Chief Federal Defender, Legal Aid & Defender Assoc. of Detroit, Eastern District of Michigan

Dennis G. Terez, Federal Public Defender, Northern District of Ohio

Scott Wendelsdorf, Executive Director, Western Kentucky Federal Community Defender, Inc., Western District of Kentucky

SEVENTH CIRCUIT:

Carol Brook, Executive Director, Federal Defender Program, Northern District of Illinois

Jerome T. Flynn, Executive Director, Federal Community Defenders, Inc., Northern District of Indiana

Phillip J. Kavanaugh, Federal Public Defender, Southern District of Illinois

William E. Marsh, Executive Director, Indiana Federal Community Defender, Inc., Southern District of Indiana

Richard H. Parsons, Federal Public Defender, Central District of Illinois

Daniel Stiller, Federal Defender, Eastern & Western Districts of Wisconsin

EIGHTH CIRCUIT:

Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri

Nicholas T. Drees, Federal Public Defender, Southern District of Iowa

Jenniffer Morris Horan, Federal Public Defender, Eastern and Western Districts of Arkansas

Lee Lawless, Federal Public Defender, Eastern District of Missouri

Katherian D. Roe, Federal Public Defender, District of Minnesota

David Stickman, Federal Public Defender, District of Nebraska

Jeffrey L. Viken, Federal Public Defender, Districts of North Dakota and South Dakota

NINTH CIRCUIT:

Daniel J. Broderick, Federal Public Defender, Eastern District of California

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Fred Richard Curtner, Federal Public Defender, District of Alaska

Frances A. Forsman, Federal Public Defender, District of Nevada

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John T. Gorman, Federal Public Defender, District of Guam

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JOINT APPENDIX

151

No. 09-5201

Supreme Court, U.S.
FILED
JAN 14 2010
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In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,
v.
J. E. THOMAS, Warden,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JULY 8, 2009
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589

TABLE OF CONTENTS

Page

Relevant Docket Entries in the United States District Court for the District of Oregon, *Barber v. Thomas*, CV 08-226-MO JA-1

Relevant Docket Entries in the United States District Court for the District of Oregon, *Jihad-Black v. Thomas*, CV 08-227-MO JA-2

Relevant Docket Entries in the United States District Court for the District of Oregon, *Tablada v. Daniels*, CV 06-762-MO JA-3

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Barber v. Thomas*, No. 08-35945 ..... JA-5

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Jihad Black v. Thomas*, No. 08-35940 ..... JA-6

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Tablada v. Thomas*, No. 08-35538 ..... JA-8

Ninth Circuit Order summarily affirming denial of habeas relief JA-11

District Court Order denying habeas corpus relief in *Barber v. Thomas*, CV 08-226-MO dated October 27, 2009 ..... JA-13

District Court Order denying habeas corpus relief in *Jihad-Black v. Thomas*, CV 08-227-MO dated October 27, 2009 . JA-25

Tablada v. Thomas, CA 07-35538 (9th Cir. July 3, 2008) (slip opinion) JA-36

Ninth Circuit Order denying panel and en banc rehearing dated March 20, 2009 ..... JA-56

18 U.S.C. § 3624(b) (repealed 1996) JA-58

28 C.F.R. § 523.20 (2005) JA-60

Federal Register Notice Sept. 26, 1997 . JA-62

Federal Register Notice June 25, 2003 . JA-70

Federal Register Notice Nov. 3, 2005 .. JA-80

BOP's Sentence Computation Manual, Program Statement 5880.28 (excerpt) .. JA-90

Clair A. Cripe, General Counsel, Memo Nov. 7, 1988, Good Conduct Time Credit Under 18 U.S. Code 3624(b) JA-120

Operations Memorandum 018-89, Feb. 2, 1989, *Mistretta v. United States*, Supreme Court Decision on Sentencing Guidelines JA-129

Operations Memorandum 026-89, Feb. 21, 1989, Computation Procedures for CCA Conditional Guidelines JA-134

United States Sentencing Commission, *Supplemental Report On The Initial Sentencing Guidelines And Policy Statements* (June 18, 1987) (excerpt) .. JA-140

Declaration of Harlan Penn JA-152

Motion to Strike Sur-Reply to Motion by Ismael Tablada JA-156

Transcript of Proceedings held on April 6, 2007 ..... JA-161

United States District Court
for the District of Oregon

Michael Barber, Petitioner
v.
J.E. Thomas, Respondent
CV 08-226-MO

RELEVANT DOCKET ENTRIES

No.	Date	General Description
4	04/02/2008	Amended petition for writ of habeas corpus by Michael Barber against J.E. Thomas
5	10/17/2008	Motion for judgment by Michael Barber
6	10/27/2008	Order denying petition

United States District Court
for the District of Oregon

Tahir Jihad-Black, Petitioner
v.
J.E. Thomas, Respondent
CV 08-227-MO

No.	Date	General Description
1	02/22/2008	Petition for writ of habeas corpus by Tahir Jihad-Black against J.E. Thomas
4	10/17/2008	Motion for judgment
5	10/27/2008	Order denying petition

United States District Court
for the District of Oregon

Ismael Tablada, Petitioner
v.
Charles Daniels, Respondent
CV 06-762-MO

No.	Date	General Description
2	05/30/2006	Petition for writ of habeas corpus by Ismael Tablada against Charles Daniels
8	07/26/2006	Order to dismiss
14	08/25/2006	Response to habeas petition by Charles Daniels
21	10/31/2006	Amended petition for writ of habeas corpus
22	11/01/2006	Request for production of documents by Ismael Tablada
24	11/21/2006	Memorandum in support of petition for writ of habeas corpus by Ismael Tablada
32	02/16/2007	Response to petitioner's preliminary memorandum in support of petition for writ of habeas corpus by Charles Daniels

35	03/09/2007	Reply to response to preliminary memorandum in support of petition for writ of habeas corpus by Ismael Tablada
38	03/19/2007	Amended sur-reply to petitioner's reply to response to preliminary memorandum in support of petition for writ of habeas corpus by Charles Daniels
39	03/19/2007	Harlan Penn declaration
40	03/21/2007	Motion to Strike Sur-Reply to Motion by Ismael Tablada
44	05/11/2007	Opinion and order denying petition and dismissing with prejudice
45	05/11/2007	Judgment
48	07/06/2007	Transcript of proceedings held on April 6, 2007

United States Court of Appeals
for the Ninth Circuit

Michael Gary Barber, Petitioner-Appellant
v.
J.E. Thomas, Respondent-Appellee
No. 08-35945

No.	Date	General Description
2	12/17/2008	Motion to consolidate cases 08-35940 and 08-35945 by Michael Gary Barber
3	12/19/2008	Order denying motions to consolidate case Nos. 08-35940 and 08-35945
4	12/24/2008	Motion to stay proceedings by Michael Gary Barber
5	12/29/2009	Order granting motions to stay proceedings
8	03/25/2009	Motion for miscellaneous relief by Michael Gary Barber
10	04/10/2009	Order granting motions for summary affirmance and consolidation of appeal Nos. 08-35940 and 08-35945 with appeal No. 07-35538

United States Court of Appeals
for the Ninth Circuit

Tahir Abdul Jihad-Black, Petitioner-Appellant
v.
J.E. Thomas, Respondent-Appellee
No. 08-35940

No.	Date	General Description
2	12/17/2008	Motion to consolidate cases 08-35940 and 08-35945 by Tahir Abdul Jihad-Black
3	12/19/2008	Order denying motions to consolidate case Nos. 08-35940 and 08-35945
4	12/24/2008	Motion to stay proceedings by Tahir Abdul Jihad-Black
5	12/29/2009	Order granting motions to stay proceedings
8	03/25/2009	Motion for miscellaneous relief by Tahir Abdul Jihad-Black

10	04/10/2009	Order granting motions for summary affirmance and consolidation of appeal Nos. 08-35940 and 08-35945 with appeal No. 07-35538
13	12/04/2009	Supreme Court November 30, 2009, order granting motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certorari in *Barber v. Thomas et al.*, No. 09-5201

United States Court of Appeals
for the Ninth Circuit

Ismael Tablada, Petitioner-Appellant
v.
J.E. Thomas, Respondent-Appellee
No. 07-35538

No.	Date	General Description
11	09/27/2007	Opening brief by Ismael Tablada
13	10/25/2007	Answering brief by Charles Daniels
15	11/08/2007	Reply brief by Ismael Tablada
20	02/22/2008	Additional citations by Charles Daniels
22	02/26/2008	Letter response by Ismael Tablada
23	03/04/2008	Additional citations by Charles Daniels
26	03/05/2008	Additional citations by Charles Daniels
27	03/06/2008	Letter response by Ismael Tablada
28	07/03/2008	Opinion: Affirmed
29	08/15/2008	Petition for panel rehearing and petition for rehearing en banc by Ismael Tablada

31	08/22/2008	Amicus brief by Erwin Chemerinsky, Esquire, NACDL, NAFD and Ninth Circuit Federal and Community Public Defenders, National Association of Criminal Defense Lawyers, National Association of Federal Defenders
32	08/27/2008	Motion to join in previously filed brief amici curiae in support of appellant's petition for rehearing and rehearing en banc by Erwin Chemerinsky
34	09/09/2008	Order requesting appellee to file a response to the petition for rehearing en banc
35	09/29/2008	Response to petition for panel and en banc rehearing
37	10/06/2008	Received reply to response to petition for rehearing and rehearing en banc by Ismael Tablada

40	10/10/2008	Reply to response to petition for rehearing and rehearing en banc by Ismael Tablada
41	03/20/2009	Order denying petition for rehearing and rejecting petition for rehearing en banc
42	04/10/2009	Order granting motions for summary affirmance and consolidation of appeal Nos. 08-35940 and 08-35945 with appeal No. 07-35538
47	04/14/2009	Mandate Issued
48	06/25/2009	Notice from Supreme Court: petition for certiorari filed on 06/18/2009. Supreme Court Number 08-11034.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 10 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ISMAEL TABLADA,
Petitioner - Appellant,

No. 07-35538
v. D.C. No. CV-06-00762-MWM
District of Oregon, Portland

J.E. THOMAS, Warden, FCI Sheridan,
Respondent - Appellee.

TAHIR ABDUL JIHAD-BLACK,
Petitioner - Appellant,

No. 08-35940
v. D.C. No. 3:08-cv-00227-MO
District of Oregon, Portland

J.E. THOMAS, Warden, FCI Sheridan,
Respondent - Appellee.

MICHAEL GARY BARBER,
Petitioner - Appellant,

v.

No. 08-35945
D.C. No. 3:08-cv-00226-MO
District of Oregon, Portland

J.E. THOMAS, Warden, FCI Sheridan,
Respondent - Appellee.

ORDER

Before: LEAVY, GRABER and BEA, Circuit Judges.

The Clerk shall amend the docket to substitute J.E. Thomas, Warden, as the proper appellee in these appeals. *See* Fed. R. App. P. 43(c)(2).

Appellants' unopposed motions for summary affirmance of appeal Nos. 08- 35940 and 08-35945 are granted. The district court's judgments in those actions are summarily affirmed. The mandate shall issue forthwith in these appeals.

Appellants' motions to consolidate appeal Nos. 08-35940 and 08-35945 with appeal No. 07-35538 for purposes of filing a petition for writ of certiorari with the United States Supreme Court are granted.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FILED 08 OCT 27 13:35 USDC-ORP

MICHAEL BARBER,
Petitioner,

vs. Civ. No. 08-226 MO

J. E. THOMAS,
Warden, FCI Sheridan,
Respondent.

ORDER

Upon agreement of the parties, the Court makes the following findings

The Court finds that the petition for writ of habeas corpus filed on February 22, 2008, raises the same issues raised in *Tablada v. Daniels,* CV 06-762 MO, petition for rehearing pending in *Tablada v. Thomas,* CA 07-35538.

The Court further finds that the parties are in agreement that the resolution of *Tablada* will be dispositive to the disposition of this case at the district court level even though there have been procedural changes in the *Tablada* case that do not materially affect the parties original agreement as to the disposition of this case;

The Court further finds that the parties are in agreement that the pleadings, including discovery, filed in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated by reference and should constitute the record in this case;

The Court further finds that the parties are in agreement that the Order and Opinion in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated as the Order and Opinion in this case;

THEREFORE, the Court orders that the record in this case shall incorporate by reference the pleadings filed in *Tablada v. Daniels*, CV 06-762 MO, and shall include all discovery presented in that case;

The Court further orders that the Opinion and Order filed in *Tablada v. Daniels*, CV 06-762 MO, shall be entered in this case as the Opinion and Order.

IT IS SO ORDERED this 27 day of October, 2008.

/s/
Michael W. Mosman
District Court Judge

Presented by:

/s/
Stephen R. Sady
Chief Deputy Federal Public Defender

*/s/*_____
Scott Asphaug
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ISMAEL TABLADA,
Petitioner,

v. Civil No. 06-762-MO

CHARLES DANIELS,
Respondent.

OPINION AND ORDER

Stephen R. Sady
Chief Deputy Federal Defender
101 S.W. Main Street, Suite 1700
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Karin J. Immergut
United States Attorney
Scott Erik Asphaug
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1000 SW Third Avenue, Suite 600
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Attorneys for Respondent

MOSMAN, District Judge.

Petitioner brings this habeas corpus action

pursuant to 28 U.S.C. § 2241 in which he challenges the Bureau of Prisons' method for calculating good conduct time ("GCT") toward the service of his federal sentence. For the reasons set forth below, the Amended Petition for Writ of Habeas Corpus (#21) is denied.

BACKGROUND

On December 17, 1990, petitioner was convicted in the District of Minnesota of a narcotics offense in violation of 18 U.S.C. § 846. Petitioner currently has a GCT projected release date of April 16, 2008 at which time he will be subject to deportation.

Petitioner filed this habeas corpus action challenging the method utilized by the Bureau of Prisons ("BOP") to calculate his GCT. Petitioner argues that GCT should be derived from the length of the sentence imposed, not the time an inmate actually serves in prison. Specifically, petitioner raises the following grounds for relief:

1. The BOP's decision to award petitioner GCT on a time served basis violates the Administrative Procedures Act, 5 U.S.C. §§ 553 and 706; and

2. The BOP's decision to apply its interpretation of 18 U.S.C. § 3624(b) to petitioner's case violates the *Ex Post Facto* Clause.

Petitioner therefore asks the court to invalidate the method the BOP currently uses to calculate GCT, and order respondent to recalculate his sentence accordingly.

DISCUSSION

I. Application of the Administrative Procedures Act ("APA").

The statute governing the allocation of good time credits to federal prisoners provides, in relevant part, the following:

> [A] prisoner who is serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

18 U.S.C. § 3624(b)(1).

The BOP's implementing regulation provides as follows:

> Pursuant to 18 U.S.C. 3624(b), as in

> effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 523.20.

Petitioner argues that 28 C.F.R. § 523.20 was not promulgated through the notice-and-comment requirements of § 553 of the APA, and is therefore invalid. Section 553 of the APA requires that an agency: (1) publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's effective date; and (2) provide the public with an opportunity to comment on the rule.

The BOP published 28 C.F.R. § 523.20 for comment in 1997 as an interim rule. 62 Fed. Reg. 50786-01, 50786-87 (Sept. 26, 1997). No public comments were submitted, and in 2003 the BOP published a change (pertaining to inmate literacy) to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01, 37776-77 (June 25, 2003). 28 C.F.R. § 523.20 became final on December 5, 2005. 70 Fed. Reg. 66752-01, 66752-53 (Nov. 3, 2005). It is therefore clear that the BOP promulgated this regulation through the notice-and-comment procedure. Moreover, the Ninth Circuit has clearly stated that the "BOP regulation in question, 28 C.F.R. § 523.20, was

adopted through the notice-and-comment procedure..." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001). Accordingly, petitioner's allegations on this point are without merit.

Petitioner also argues that the court should invalidate the BOP's method of calculating GCT under § 706(2)(A) of the APA which provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." Petitioner's argument is based on his assertion that the U.S. Sentencing Commission, not the BOP, was vested with the authority to implement the Sentencing Reform Act of 1984, and that the BOP failed to consider the Sentencing Commission's alternative interpretation of § 3624(b)(1) when promulgating 28 C.F.R. § 523.20. Consequently, petitioner concludes that the regulation is unreasonable and irrational.

Assuming that 18 U.S.C. § 3625 does not preclude consideration of this issue,[1] the Ninth Circuit

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[1]18 U.S.C. § 3625 provides that various sections of the APA, including § 706, do not apply "to the making of any determination, decision, or order under this subchapter." The statute underlying the current action, 18 U.S.C. § 3624(b), is included in the "subchapter" identified in § 3625. *See Krilich v. Federal Bureau of Prisons*, 346 F.3d 157, 158 n. 2 (6th Cir. 2003) (§ 3625 applies to 18 U.S.C. §§ 3621, et seq.). Because it is unclear whether the promulgation of a rule constitutes a "determination, decision, or order" under § 3625, the court resolves this claim on the merits.

clearly found that § 3624(b)(1) is ambiguous, and that "[t]he BOP regulation that adopts the term served rather than the sentence imposed as the basis for the proration . . . falls within the implied statutory authority of the BOP." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1270 (9th Cir. 2001). Not only did the *Pacheco-Camacho* court find that the BOP had the statutory authority to promulgate 28 C.F.R. 523.20, it also concluded that the BOP's interpretation of § 3624(b)(1) is reasonable and considered the "sentence imposed" calculation proposed by the petitioner to be "inconsistent with the statute . . . ." Id at 1268. The Ninth Circuit revisited the issue again in *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005), and reiterated that the BOP's interpretation of § 3624(b)(1) was reasonable. *Id* at 995-999.

Petitioner asserts that *Pacheco-Camacho* and *Mujahid* are unconstitutional rulings and violate the basic rules of statutory construction. Petitioner is unable to cite to any Supreme Court or en banc Ninth Circuit decision invalidating *Pacheco-Camacho* or *Mujahid*. Instead, he cites a comment by Supreme Court Justice John Paul Stevens made during the Court's denial of certiorari pertaining to a Fifth Circuit case. Justice Stephens stated that the calculation of GCT "has sufficient importance to merit further study, not only by judges but by other Government officials as well." *Moreland v. Federal Bureau of Prisons*, 126 S.Ct. 1906 (2006) (Stevens, J., statement respecting denial of certiorari). This statement is insufficient to cast doubt on the vitality of *Pacheco-Camacho* and *Mujahid*.

Even if this court were not bound by Ninth Circuit precedent, a variety of other circuit courts have determined that the BOP's method for calculating GCT is reasonable. *See Brown v. McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005); *Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 534 (4th Cir. 2005); *Perez-Olivio v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005); *Bernitt v. Martinez*, 432 F.3d 868, 869 (8th Cir. 2005); *White v. Schibana*, 390 F.3d 997, 1002-03 (7th Cit. 2004). In light of the binding precedent of this Circuit, as well as the opinions of numerous other circuits holding that the BOP's method for calculating GCT is reasonable, the court cannot conclude that the BOP's method is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

II. *Ex Post Facto* Challenge.

Petitioner also asserts that the current calculation of his GCT violates the *Ex Post Facto* Clause because 28 C.F.R. § 523.20 had not been implemented at the time he committed his crime in 1990. He argues that at the time of his offense, only the Sentencing Commission's "sentence imposed" interpretation of § 3624(b) was in existence, and that interpretation was more favorable to him than the "time served" interpretation the BOP currently applies. He therefore contends that he had a settled expectation regarding the calculation of his GCT based on the Sentencing Commission's interpretation.

The *Ex Post Facto* Clause of the U.S.

Constitution prohibits the enactment of laws which, by retroactive operation, increase the punishment for a crime after its commission. *Garner v. Jones*, 529 U.S. 244, 250 (2000). A law violates the *Ex Post Facto* Clause if: (1) it "appl[ies] to events occurring before its enactment," *Weaver v. Graham*, 450 U.S. 24, 29 (1981); and "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Calif. Dep't. of Corr. v. Morales*, 514 U.S. 499, 504 (1995).

While 28 C.F.R. § 523.20 was not formally implemented until 1997, the BOP has consistently calculated GCT using the time served methodology since the adoption of the Comprehensive Crime Control Act of 1984. *See* Declaration of Scott Erik Asphaug, p. 2. Because the BOP has consistently calculated GCT based on a prisoner's time served, and since this practice predates petitioner's underlying crime, petitioner did not have a settled expectation in an alternative interpretation and was not disadvantaged by the enactment of 28 C.F.R. § 523.20. Accordingly, there is no *ex post facto* violation.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#21) is DENIED, and this case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 11th day of May, 2007.

/s/ Michael W. Mosman
Michael W. Mosman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FILED 08 OCT 27 13:35 USCD-ORP

TAHIR JIHAD-BLACK,
Petitioner,

vs. Civ. No. 08-227 MO

J. E. THOMAS, Warden, FCI Sheridan,
Respondent.

ORDER

Upon agreement of the parties, the Court makes the following findings

The Court finds that the petition for writ of habeas corpus filed on February 22, 2008, raises the same issues raised in *Tablada v. Daniels*, CV 06-762 MO, petition for rehearing pending in *Tablada v. Thomas*, CA 07-35538.

The Court further finds that the parties are in agreement that the resolution of *Tablada* will be dispositive to the disposition of this case at the district court level even though there have been procedural changes in the *Tablada* case that do not materially affect the parties original agreement as to the disposition of this case;

The Court further finds that the parties are in agreement that the pleadings, including discovery, filed in *Tablada v. Daniels*, CV 06-762 MO, should be incorporated by reference and should constitute the record in this case;

The Court further finds that the parties are in agreement that the Order and Opinion in *Tablada* v. *Daniels*, CV 06-762 MO, should be incorporated as the Order and Opinion in this case;

THEREFORE, the Court orders that the record in this case shall incorporate by reference the pleadings filed in *Tablada v. Daniels*, CV 06-762 MO, and shall include all discovery presented in that case; The Court further orders that the Opinion and Order filed in *Tablada* v. *Daniels*, CV 06-762 MO, shall be entered in this case as the Opinion and Order.

IT IS SO ORDERED this 27 day of October, 2008.

/s/
Michael W. Mosman
United States District Judge

Presented by:
/s/ Stephen R. Sady
Stephen R. Sady
Chief Deputy Federal Public Defender

/s/ Scott Asphaug
Scott Asphaug
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ISMAEL TABLADA,
Petitioner,

v. Civil No. 06-762-MO

CHARLES DANIELS,
Respondent.

OPINION AND ORDER

Stephen R. Sady
Chief Deputy Federal Defender
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Attorneys for Respondent

MOSMAN, District Judge.

Petitioner brings this habeas corpus action

pursuant to 28 U.S.C. § 2241 in which he challenges the Bureau of Prisons' method for calculating good conduct time ("GCT") toward the service of his federal sentence. For the reasons set forth below, the Amended Petition for Writ of Habeas Corpus (#21) is denied.

BACKGROUND

On December 17, 1990, petitioner was convicted in the District of Minnesota of a narcotics offense in violation of 18 U.S.C. § 846. Petitioner currently has a GCT projected release date of April 16, 2008 at which time he will be subject to deportation.

Petitioner filed this habeas corpus action challenging the method utilized by the Bureau of Prisons ("BOP") to calculate his GCT. Petitioner argues that GCT should be derived from the length of the sentence imposed, not the time an inmate actually serves in prison. Specifically, petitioner raises the following grounds for relief:

1. The BOP's decision to award petitioner GCT on a time served basis violates the Administrative Procedures Act, 5 U.S.C. §§ 553 and 706; and

2. The BOP's decision to apply its interpretation of 18 U.S.C. § 3624(b) to petitioner's case violates the *Ex Post Facto* Clause.

Petitioner therefore asks the court to invalidate the method the BOP currently uses to calculate GCT, and order respondent to recalculate his sentence accordingly.

DISCUSSION

I. Application of the Administrative Procedures Act ("APA").

The statute governing the allocation of good time credits to federal prisoners provides, in relevant part, the following:

> [A] prisoner who is serving a term of imprisonment of more than 1 year . . . may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.

18 U.S.C. § 3624(b)(1).

The BOP's implementing regulation provides as follows:

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> effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 523.20.

Petitioner argues that 28 C.F.R. § 523.20 was not promulgated through the notice-and-comment requirements of § 553 of the APA, and is therefore invalid. Section 553 of the APA requires that an agency: (1) publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's effective date; and (2) provide the public with an opportunity to comment on the rule.

The BOP published 28 C.F.R. § 523.20 for comment in 1997 as an interim rule. 62 Fed. Reg. 50786-01, 50786-87 (Sept. 26, 1997). No public comments were submitted, and in 2003 the BOP published a change (pertaining to inmate literacy) to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01, 37776-77 (June 25, 2003). 28 C.F.R. § 523.20 became final on December 5, 2005. 70 Fed. Reg. 66752-01, 66752-53 (Nov. 3, 2005). It is therefore clear that the BOP promulgated this regulation through the notice-and-comment procedure. Moreover, the Ninth Circuit has clearly stated that the "BOP regulation in question, 28 C.F.R. § 523.20, was

adopted through the notice-and-comment procedure..." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001). Accordingly, petitioner's allegations on this point are without merit.

Petitioner also argues that the court should invalidate the BOP's method of calculating GCT under § 706(2)(A) of the APA which provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." Petitioner's argument is based on his assertion that the U.S. Sentencing Commission, not the BOP, was vested with the authority to implement the Sentencing Reform Act of 1984, and that the BOP failed to consider the Sentencing Commission's alternative interpretation of § 3624(b)(1) when promulgating 28 C.F.R. § 523.20. Consequently, petitioner concludes that the regulation is unreasonable and irrational.

Assuming that 18 U.S.C. § 3625 does not preclude consideration of this issue,[1] the Ninth Circuit

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[1]18 U.S.C. § 3625 provides that various sections of the APA, including § 706, do not apply "to the making of any determination, decision, or order under this subchapter." The statute underlying the current action, 18 U.S.C. § 3624(b), is included in the "subchapter" identified in § 3625. See Krilich v. Federal Bureau of Prisons, 346 F.3d 157, 158 n. 2 (6th Cir. 2003) (§ 3625 applies to 18 U.S.C. §§ 3621, et seq.). Because it is unclear whether the promulgation of a rule constitutes a "determination, decision, or order" under § 3625, the court resolves this claim on the merits.

clearly found that § 3624(b)(1) is ambiguous, and that "[t]he BOP regulation that adopts the term served rather than the sentence imposed as the basis for the proration . . . falls within the implied statutory authority of the BOP." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1270 (9th Cir. 2001). Not only did the *Pacheco-Camacho* court find that the BOP had the statutory authority to promulgate 28 C.F.R. 523.20, it also concluded that the BOP's interpretation of § 3624(b)(1) is reasonable and considered the "sentence imposed" calculation proposed by the petitioner to be "inconsistent with the statute . . . ." *Id* at 1268. The Ninth Circuit revisited the issue again in *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005), and reiterated that the BOP's interpretation of § 3624(b)(1) was reasonable. *Id* at 995-999.

Petitioner asserts that *Pacheco-Camacho* and *Mujahid* are unconstitutional rulings and violate the basic rules of statutory construction. Petitioner is unable to cite to any Supreme Court or en banc Ninth Circuit decision invalidating *Pacheco-Camacho* or *Mujahid*. Instead, he cites a comment by Supreme Court Justice John Paul Stevens made during the Court's denial of certiorari pertaining to a Fifth Circuit case. Justice Stephens stated that the calculation of GCT "has sufficient importance to merit further study, not only by judges but by other Government officials as well." *Moreland v. Federal Bureau of Prisons*, 126 S.Ct. 1906 (2006) (Stevens, J., statement respecting denial of certiorari). This statement is insufficient to cast doubt on the vitality of *Pacheco-Camacho* and *Mujahid*.

Even if this court were not bound by Ninth Circuit precedent, a variety of other circuit courts have determined that the BOP's method for calculating GCT is reasonable. *See Brown v. McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005); *Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 534 (4th Cir. 2005); *Perez-Olivio v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005); *Bernitt v. Martinez*, 432 F.3d 868, 869 (8th Cir. 2005); *White v. Schibana*, 390 F.3d 997, 1002-03 (7th Cit. 2004). In light of the binding precedent of this Circuit, as well as the opinions of numerous other circuits holding that the BOP's method for calculating GCT is reasonable, the court cannot conclude that the BOP's method is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

II. *Ex Post Facto* Challenge.

Petitioner also asserts that the current calculation of his GCT violates the *Ex Post Facto* Clause because 28 C.F.R. § 523.20 had not been implemented at the time he committed his crime in 1990. He argues that at the time of his offense, only the Sentencing Commission's "sentence imposed" interpretation of § 3624(b) was in existence, and that interpretation was more favorable to him than the "time served" interpretation the BOP currently applies. He therefore contends that he had a settled expectation regarding the calculation of his GCT based on the Sentencing Commission's interpretation.

The *Ex Post Facto* Clause of the U.S.

Constitution prohibits the enactment of laws which, by retroactive operation, increase the punishment for a crime after its commission. *Garner v. Jones*, 529 U.S. 244, 250 (2000). A law violates the *Ex Post Facto* Clause if: (1) it "appl[ies] to events occurring before its enactment," *Weaver v. Graham*, 450 U.S. 24, 29 (1981); and "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Calif. Dep't. of Corr. v. Morales*, 514 U.S. 499, 504 (1995).

While 28 C.F.R. § 523.20 was not formally implemented until 1997, the BOP has consistently calculated GCT using the time served methodology since the adoption of the Comprehensive Crime Control Act of 1984. *See* Declaration of Scott Erik Asphaug, p. 2. Because the BOP has consistently calculated GCT based on a prisoner's time served, and since this practice predates petitioner's underlying crime, petitioner did not have a settled expectation in an alternative interpretation and was not disadvantaged by the enactment of 28 C.F.R. § 523.20. Accordingly, there is no *ex post facto* violation.

CONCLUSION

For the reasons identified above, the Amended Petition for Writ of Habeas Corpus (#21) is DENIED, and this case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 11th day of May, 2007.

/s/ Michael W. Mosman
Michael W. Mosman
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISMAEL TABLADA,
Petitioner-Appellant,

v.

No. 07-35538
D.C. No.
CV 06-00762-MO
OPINION

J.E. THOMAS,* Warden, Federal Correction Institute, Sheridan,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
March 7, 2008—Portland, Oregon

Filed July 3, 2008

Before: Marsha S. Berzon and Carlos T. Bea, Circuit

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*J.E. Thomas is substituted for his predecessor Charles Daniels as Warden of the Federal Correction Institute, Sheridan, Oregon. Fed. R. App. P. 43(c)(2).

Judges, and Philip S. Gutierrez,** District Judge.

Opinion by Judge Gutierrez

COUNSEL

Stephen R. Sady, Chief Deputy Federal Public Defender, Portland, Oregon, for petitioner-appellant Ismael Tablada.

Karin J. Immergut, United States Attorney, Scott E. Asphaug, Assistant United States Attorney, and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for the respondent-appellee.

OPINION

GUTIERREZ, District Judge:

In this appeal, we consider whether the Bureau of Prisons ("BOP") violated the Administrative Procedure Act ("APA") in promulgating 28 C.F.R. § 523.20, the regulation interpreting 18 U.S.C. § 3624(b), which governs the calculation of good conduct time for federal prisoners. The district court held that the BOP's interpretation in § 523.20 was reasonable and that it did not violate § 706(2)(A) of the APA. Accordingly, the district court denied the petitioner's habeas petition which challenged the BOP's

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**The Honorable Philip S. Gutierrez, United States District Judge for the Central District of California, sitting by designation.

calculation of the length of time the petitioner had left to serve on his sentence. The BOP has conceded it violated § 706(2)(A) of the APA by failing to articulate a rational basis for its decision to promulgate § 523.20. We hold that the remedy for this violation is to interpret the federal statute in accordance with the BOP's Program Statement 5880.28, and so affirm.

I. BACKGROUND & PROCEDURE

Ismael Tablada is an inmate at the Federal Correctional Institute in Sheridan, Oregon. Tablada was convicted of a narcotics offense in the District of Minnesota. On December 17, 1990, he was sentenced to a 20-year term of imprisonment, followed by 10 years of supervised release. As of February 2007, Tablada's projected release date, taking into consideration his good time credit, was April 16, 2008.[1]

On October 31, 2006, Tablada filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. In the petition, Tablada challenges the BOP's calculation of good time credits pursuant to the good time credit statute, 18 U.S.C. § 3624(b). Tablada contends that in promulgating its method for

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[1]Tablada's projected release date has passed. This fact, however, does not render his appeal moot because his sentence includes a term of supervised release. *See Mujahid v. Daniels*, 413 F.3d 991, 994-995 (2005) ("The 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot").

calculation of good time conduct credit in 28 C.F.R. § 523.20 and Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), the BOP failed to articulate a rational basis for its interpretation of the federal statute, thus violating 5 U.S.C. § 706(2)(A).[2]

A. *Good Time Credit Statute, 18 U.S.C. § 3624(b)*

Title 18 U.S.C. § 3624 governs the timing of federal prisoners' release from custody. Section 3624(b) provides in relevant part:

> (b) Credit toward service of sentence for satisfactory behavior.—
>
> (1) . . . a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each

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[2]Tablada's habeas corpus petition also claimed the BOP regulation and Program Statement are invalid because they violate the APA, 5 U.S.C. § 553, which requires a notice and comment period, and the Ex Post Facto Clause. The district court rejected both claims. Tablada has abandoned these claims by failing to raise them in his brief on appeal. *See Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007).

> year of the prisoner's *term of imprisonment*, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations... [C]redit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1) (emphasis added).

B. *BOP Program Statement and Regulation*

Since the passage of 18 U.S.C. § 3624(b) in 1984, the BOP has interpreted good time credit to be based on the *time served* by the prisoner. In November 1988, the BOP's general counsel issued an internal memorandum advising staff of the procedures for awarding good time credits under § 3624(b). The memorandum recited the text of § 3624(b), and stated that "good conduct time is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of *time served*." (emphasis added). In February 1992, BOP formalized this interpretation of § 3624 via the BOP Program Statement 5880.28.

In September 1997, the BOP published for comment as an interim rule 28 C.F.R. § 523.20, which was the BOP's interpretation of § 3624(b). 62 Fed. Reg. 50786-01 (Sept. 26, 1997). The commentary to the

interim rule stated that "[t]he awarding and vesting of good conduct time at a rate of 54 days per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) ha[s] been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984." *Id.* at 50786. The BOP received no public comments, and, in 2003, published a change to the proposed rule and again accepted comments. 68 Fed. Reg. 37776-01 (June 25, 2003). On December 5, 2005, 28 C.F.R. § 523.20 became final. 70 Fed. Reg. 66752-01 (Nov. 3, 2005). 28 C.F.R. § 523.20 provides:

> (a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) *for each year served.* This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 523.20(a) (emphasis added).[3]

In accordance with the BOP's regulatory

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[3]This version of 28 C.F.R. § 523.20 is different from the version quoted by the district court in his order. The district court used a previous version of the regulation which was effective until December 4, 2005. However, the distinctions between the previous version and the amended regulation, quoted here, do not affect the analysis.

scheme, the prisoner does not earn the first 54 days of good time credit until *after* completing 365 days of incarceration. *Mujahid*, 413 F.3d at 996. During the last year of incarceration, the BOP prorates the good time credits, awarding the prisoner 0.148 days credit [54/365 = 0.148] for every day actually served that year. *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1267-1268 (9th Cir. 2001). The BOP's admittedly "complicated" mathematical formula yields, for a model federal prisoner with a 10-year sentence, a maximum of 470 days of good time credit, which includes no credit when the prisoner is not in prison. *Id.* at 1269.

The BOP's interpretation of the good time conduct statute led to the filing of numerous lawsuits by federal prisoners. Like Tablada, these prisoners contested the methodology by which the BOP computes good time credit under § 3624(b)(1), reading the statute as awarding good time credit based on the *sentence imposed* rather than the *time served*. Under their interpretation, a model federal prisoner with a 10- year sentence would be entitled to 540 days of credit [54 days/yr x 10 yrs = 540], rather than the 470 days awarded under the BOP's method. Faced with these competing interpretations of § 3624(b), we have upheld the validity of the BOP's interpretation of "term of imprisonment" in § 3624(b) as meaning time served rather than sentence imposed. *See Pacheco-Camacho*, 272 F.3d at 1271.

In *Pacheco-Camacho*, we noted that § 523.20 was adopted through the APA's notice-and-comment

procedure, and that the BOP's interpretation of § 3624(b) via § 523.20 was therefore entitled to full *Chevron* deference.[4] *Id.* at 1268 (citing *Chevron*, 467 U.S. 837). Applying the first step of the *Chevron* analysis, we looked at both the plain language of the statute and its legislative history, and found that the meaning of "term of imprisonment" as used in § 3624(b) was ambiguous. *Id.* at 1269-70. Proceeding to the second *Chevron* step, we then asked whether the BOP's interpretation was "reasonable." *Id.* at 1270. Answering in the affirmative, we concluded that the BOP's interpretation "comports with the statutory language of section 3624(b), and does not subvert the statutory design." *Id.*

Nearly four years later we revisited the same issue in *Mujahid*, 413 F.3d at 998. Citing *Pacheco-Camacho*, we reaffirmed the reasonableness of the BOP's interpretation of § 3624(b). *Id.* at 999

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[4]Under *Chevron*, the Court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear," then the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Next, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citations omitted).

("Mujahid's position rests on an interpretation of this statute at odds with binding authority of this court").

Notwithstanding our decisions in *Pacheco-Camacho* and *Mujahid*, Tablada filed this habeas petition, but under a different theory. Unlike the previous challenges to the reasonableness of the BOP's construction of § 3624(b), Tablada instead contends that the BOP has not complied with the requirements of the APA, 5 U.S.C. § 706, because it has not articulated a rational basis for its decision to promulgate its interpretation of the statute. The United States District Court for the District of Oregon found that *Pacheco-Camacho* and *Mujahid* prevented it from considering Tablada's APA challenge, since the Ninth Circuit had already determined that the BOP's method for calculating good time credit was reasonable. This timely appeal followed.

After the parties submitted briefing on the instant case, we addressed the very procedural issue raised by Tablada in *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008). In *Arrington*, the petitioners brought petitions for habeas corpus which challenged 28 C.F.R. § 550.58(a)(1)(vi)(B), a BOP regulation which categorically excluded prisoners with convictions involving a firearm or other dangerous weapon or explosives from eligibility for early release under 18 U.S.C. § 3621(e). *Id.* at 1109. Reversing the district court's denial of the petitions, the Ninth Circuit held that the rule violated the APA, 5 U.S.C. § 706, because the administrative record contained no rationale explaining the BOP's decision for the categorical

exclusion. *Id.* at 1114. The district court had identified two possible rational bases for the BOP decision: "(1) the increased risk that offenders with convictions involving firearms might pose to the public and (2) the need for uniformity in the application of the eligibility regulation." *Id.* at 1113 (citations omitted). The Ninth Circuit found the first rationale, articulated only in the BOP's brief and not contained in the administrative record, was "precisely the type of '*post hoc* rationalization [ ]' of appellate counsel that we are forbidden to consider in conducting review under the APA." *Id.* (emphasis and alteration in original) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). As for the second rationale, the Ninth Circuit found it inadequate because the BOP offered no explanation for why it chose categorical *exclusion* of prisoners with convictions involving firearms to achieve uniformity, rather than categorical *inclusion* of prisoners with nonviolent convictions involving firearms, which would achieve the stated goal of uniformity. *Id.* at 1114.

The BOP now concedes that the regulation governing good time conduct credits suffers the same procedural infirmity as the regulation in *Arrington*, because the BOP failed to articulate in the administrative record the rationale upon which it relied when it promulgated the good time credit regulation.

II. STANDARD OF REVIEW

We review a district court's denial of a writ of

habeas corpus pursuant to 28 U.S.C. § 2241 *de novo*. *Id.* at 1112.

In reviewing the BOP's conduct, we consider whether the agency's promulgation of the final rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We conduct this review based solely on the administrative record and determine whether the agency has articulated a rational basis for its decision. *Arrington*, 516 F.3d at 1112 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983)).

III. DISCUSSION

[1] In light of the BOP's concession that it failed to articulate in the administrative record a rationale for the interpretation of § 3624(b)(1) promulgated in § 523.20, the only remaining issue, then, is to determine the appropriate remedy. The BOP contends that any relief in this case should be limited to a procedural correction, allowing the BOP's longstanding practice governing good conduct sentencing credits to continue until the procedural correction is effected. Tablada asks us to grant his habeas petition and order the BOP to calculate his good conduct time based on his interpretation of the good time credit statute.

A. *Deference to the BOP Interpretation of § 3624(b)*

[2] Since its promulgation of Program

Statement 5880.28 in 1992, the BOP has interpreted § 3624(b) to refer to time served, rather than sentence imposed. Thus, even if we take the invalid regulation out of the equation, we are left with an interpretation of § 3624(b) that bases good time credit on *time served* rather than *sentence imposed*.

An agency's rules are entitled to two possible levels of deference. Generally, *Chevron* deference is reserved for legislative rules that an agency issues within the ambit of the authority entrusted to it by Congress. *See United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). Such rules are characteristically promulgated only after notice and comment. *Id.* at 230. If, on the other hand, the agency rule or decision is not within an area of express delegation of authority or does not purport to have the force of law, it is entitled to a measure of deference proportional to its power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 228, 234. Under this level of review, we look to the process the agency used to arrive at its decision. *Id.*; *Skidmore*, 323 U.S. at 140. Among the factors we consider are the "interpretation's thoroughness, rational validity, [ ] consistency with prior and subsequent pronouncements," the " 'logic[ ] and expertness' of an agency decision, the care used in reaching the decision, as well as the formality of the process used." *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003) (citing *Skidmore*, 323 U.S. at 140 and *Mead*, 533 U.S. at 228).

Program Statement 5880.28 does not purport to carry the force of law and was not adopted after notice and comment. We therefore do not accord it *Chevron* deference. However, because Program Statement 5880.28 is an internal agency guideline, "akin to an 'interpretive rule' that 'do[es] not require notice and comment,'" *Reno v. Koray*, 515 U.S. 50, 61 (1995) (quoting *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)), we believe it is entitled to a measure of deference under *Skidmore*. We conclude that the Program Statement 5880.28 does meet the *Skidmore* standard, and thus provides the appropriate interpretation of § 3624. We turn now to the reasons underlying this conclusion.

B. *Application of Deference under Skidmore*

Applying the factors articulated in *Skidmore*, we find that the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable. Under *Skidmore*, one of the factors we consider is the "rational validity" of the agency decision. *See The Wilderness Society*, 353 F.3d at 1068. In *Pacheco-Camacho* and *Mujahid*, we already determined that the BOP's interpretation of § 3624(b) via its regulation, § 523.20, is "reasonable." *See Mujahid*, 413 F.3d at 998; *Pacheco-Camacho*, 272 F.3d at 1270-1271. Because Program Statement 5880.28 provides an interpretation of the federal statute identical to that in § 523.20, our conclusion in *Pacheco-Camacho* regarding the reasonableness of § 523.20 applies to it with equal force.

[3] In *Pacheco-Camacho*, we found that the BOP's methodology for calculating good time conduct credits was reasonable because it "comports with the statutory language of section 3624(b) . . . ." *Pacheco-Camacho*, 272 F.3d at 1270. In particular, we examined the statutory language of § 3624(b) and focused on its final sentence, which reads, "credit for the last year or portion of a year of the term of imprisonment shall be *prorated* and credited within the last six weeks of the sentence." *Id.* at 1268-69 (emphasis in original) (quoting 18 U.S.C. § 3624(b)(1)). Under the BOP's reading of the statute, "the model prisoner will ordinarily receive his fifty-four-day credit *after* complying with prison disciplinary rules for 365 days . . . ." *Id.* (emphasis in original). During the last year or portion of a year of the prisoner's sentence, the BOP would prorate the 54 days of credit a year to 0.148 day of credit for every actual day served during good behavior (54/365 = 0.148). *Id.* at 1267-68. Like Tablada, the plaintiff in *Pacheco-Camacho* read the statute as awarding good time credit based on the sentence imposed, so a prisoner with a ten-year sentence would receive 54-days per year multiplied by ten years, or 540 days. We found the plaintiff's reading inconsistent with a statute that contemplates prorating credit for the last year of imprisonment. *See id.* at 1269. We pointed out that under the plaintiff's interpretation (or in this case Tablada's), the model prisoner would receive a 54-day credit after serving only 311 days (365 days - 54 days), thus conferring a "windfall" on prisoners. *Id.* We noted that "[n]othing in the statute clearly suggests that Congress intended to give the prisoner such a windfall in his last year." *Id.*

Likewise in *Mujahid*, we reaffirmed the BOP's interpretation of § 3624(b) as reasonable and subject to deference. *See Mujahid*, 413 F.3d at 997.

[4] In addition to the statutory language, we also discussed in *Pacheco-Camacho* the legislative history of § 3624, and determined that the BOP's methodology for calculating good time conduct credits "does not subvert the statutory design." *Pacheco-Camacho*, 272 F.3d at 1270. By enacting § 3624, Congress sought to simplify the computation of good time credits which, under its predecessor statute, computed good time credits after every month served. *Id.* at 1269. Thus, unlike the earlier scheme which called for calculating good time credits at different monthly rates depending on the length of the prison term and which allowed prison officials discretion to withhold and restore credits depending on the inmate's subsequent behavior, the new system embodied in § 3624 envisioned that a prisoner could calculate with certainty the time of his release. *Id.* Acknowledging the complexity of the BOP's computation method, we explained that "Congress chose to tolerate the additional complexity in order to arrive at a more equitable result," namely "an effective and fair prorating scheme, enabling inmates to calculate with reasonable certainty the end of their imprisonment..." *Id.* at 1270. In sum, based on our reasoning in *Pacheco-Camacho* and *Mujahid*, we find that the methodology utilized in Program Statement 5880.28 has "rational validity."

[5] Another factor we consider under *Skidmore*

is whether the agency has applied its position consistently. *Mead*, 533 U.S. at 228; *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Here, BOP Program Statement 5880.28 has been in effect for at least sixteen years, since its implementation in 1992. *See Bowen v. Hood*, 202 F.3d 1211, 1221-1222 (9th Cir. 2000) (treating unambiguous language in a program statement as binding upon the BOP). Moreover, Program Statement 5880.28 incorporated the same sentencing credit methodology the BOP had been practicing since 1987. Tablada has not identified any instances where the BOP used any other methodology for calculating good time credits, including the methodology he proposes. We may thus assume that for more than twenty years, the BOP has consistently implemented its policy of calculating good time credits based on time served rather than sentence imposed.

[6] While Tablada and others may have asserted a reasonable alternative interpretation, *i.e.*, calculating good time credits based on sentence imposed rather than time served, the consistent and even application of the BOP's methodology promulgated in Program Statement 5880.28 since 1992 convinces us that we must accord deference to the BOP's interpretation. To change course now would have an extremely disruptive effect on the BOP's administration of the release of federal prisoners. Given this consideration, as well as the reasonableness of the BOP's interpretation of § 3624(b)(1) discussed in *Pacheco-Camacho*, we conclude that the BOP's methodology for calculating good time credits in Program Statement 5880.28 is reasonable and

persuasive.

Finally, we address Tablada's argument that the United States Sentencing Commission ("Commission") has provided the appropriate standard by which to interpret § 3624. Tablada insists that the Commission has interpreted the good time credit statute to mean a prisoner earns credit on each year of the sentence imposed. He contends that the fact that the Commission interprets § 3624 in this manner means that the "proper remedy" for the BOP's APA violation is to implement Tablada's interpretation, rather than the time served rule unless and until the BOP adopts a regulation complying with the APA that passes judicial muster.

Congress charged the Commission with establishing sentencing ranges for offenses, 28 U.S.C. § 994(b), and instructed it, "as a starting point in its development of the initial sets of guidelines," to ascertain the average sentences imposed and length of terms served prior to creation of the Commission. 28 U.S.C. § 994(m).[5] The Commission then engaged in a

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[5]28 U.S.C. § 994(m) states: "The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a

statistical analysis of data from thousands of sentences, and presented the results in the "Levels Table" in June 1987. *See* United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements, at 27-39. Table 1(a), "Estimated Time Served for Baseline Offenses: 1st Time Offenders, Convicted at Trial, Sentenced to Prison, Adjusted for Good Time" presents a statistical analysis of average sentences. *See id.*

In the Supplementary Report, the Commission provided a definition of the term "adjusted for good time":

> *Adjusted for good time.*" Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines. This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).

Id. at 23.

Tablada asserts that every federal prisoner has a term of imprisonment imposed based on a

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sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code."

Sentencing Table that assumes good time credit based on 15% of the sentence imposed.[6] He claims that because the Commission was acting in its authority to interpret the Sentencing Reform Act—including § 3624(b) covering good time credit—the Commission's (and Tablada's interpretation) should prevail.

We are not persuaded by Tablada's argument. First, if the Commission felt the BOP was erroneously interpreting § 3624(b), it had ample opportunity to make its objections known during the notice and comment periods for 28 C.F.R. § 523.20. in September 1997 and June 2003. The Commission, however, remained silent. Second and more importantly, we have already found that the BOP is the agency charged with interpreting the good time credit statute. *See Pacheco- Camacho*, 272 F.3d at 1270 ("While the statute does not explicitly vest the BOP with the authority to determine the basis for the proration of good time credits, this power is implied by the BOP's statutory authority [under 18 U.S.C. § 3624] to award good time credits to inmates serving federal sentences"). For these reasons, Tablada's argument cannot stand.

IV. CONCLUSION

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[6]Tablada's interpretation of the statute results in a prisoner being eligible for a 15% reduction in his sentence, whereas the BOP's interpretation results in an approximately 13% reduction.

The BOP has admitted it violated § 706(2)(A) of the APA in failing to set forth a valid rationale for its interpretation of the federal good time credit statute when it promulgated 28 C.F.R. § 523.20. Nevertheless, invalidating § 523.20 leaves in place the same interpretation of § 3624(b) contained in BOP Program Statement 5880.28. We conclude that the BOP's methodology for calculating good time credits in Program Statement 5880.28 is both reasonable and persuasive under *Skidmore*. We therefore affirm the district court's denial of Tablada's petition for habeas corpus.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
MAR 20 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ISMAEL TABLADA,
Petitioner - Appellant,

v.

No. 07-35538
D.C. No. CV 06-00762-MWM
District of Oregon, Portland

CHARLES DANIELS, Warden, FCI-Sheridan. Federal Bureau of Prisons
Respondent - Appellee.

ORDER

Before: BERZON and BEA, Circuit Judges, and GUTIERREZ,* District Judge.

The panel unanimously voted to deny appellant's petition for rehearing. Judge Berzon and Judge Bea voted to deny the petition for rehearing en

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*The Honorable Philip Gutierrez, District Judge, sitting by designation.

banc. Judge Gutierrez recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

18 U.S.C. § 3624(b) (repealed 1996)

Credit toward service of sentence for satisfactory behavior.– A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of

imprisonment shall be prorated and credited within the last six weeks of the sentence.

28 C.F.R. § 523.20 (2005)

§ 523.20 Good conduct time.

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high

school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development (GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

62 Red. Reg. 50786 (Sept. 26, 1997)

RULES AND REGULATIONS

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 523

[BOP-1032-i]

RIN 1120-AA62

Good Conduct Time

Friday, September 26, 1997

AGENCY: Bureau of Prisons, Justice.

ACTION: Interim rule.

SUMMARY: In this document, the Bureau of Prisons is issuing interim regulations for the awarding of good conduct time pursuant to the Prison Litigation Reform Act of 1995 (PLRA). Pursuant to the PLRA, in awarding good conduct time credit, the Bureau shall consider whether the inmate, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or equivalent degree. This interim rule provides that an inmate subject to the PLRA shall be awarded the full 54 days credit for good conduct time (prorated when the time served by the inmate for the sentence during the year

is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a General Educational Development (GED) credential. The interim rule further provides that an inmate subject to the PLRA shall be awarded 42 days credit for good conduct time per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential. The amount of good conduct time awarded is also subject to disciplinary disallowance.

DATES: Effective November 3, 1997; comments must be submitted by November 25, 1997.

ADDRESSES: Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is adopting interim regulations for the awarding of good conduct time for certain inmates. The awarding and vesting of good conduct time at a rate of 54 days per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984. The actual awarding of good conduct time occurs annually on the date marking the anniversary of the inmate's completion of one year in

Federal custody. The awarding of good conduct time is also subject to disciplinary disallowance (see Tables 3 through 6 in 28 CFR 541.13).

Further statutory mandates on vesting good conduct time were added by the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) and by the PLRA. Under the Sentencing Reform Act of 1984, good conduct time vested annually. Section 20412 of VCCLEA required, among other things, that credit toward an inmate's service of sentence shall not be vested unless the inmate has earned or is making satisfactory progress toward a high school diploma or an equivalent degree. Section 809 of the PLRA requires, among other things, that credit toward an inmate's service of sentence shall vest on the date the inmate is released from custody, and that in awarding credit, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. This interim regulation is being issued for the purpose of implementing the discretionary provision of the PLRA pertaining to the awarding of good conduct time.

Regulations for the Bureau's literacy program have been revised to include a definition of "satisfactory progress" (28 CFR 544.73(b)). The revised regulations are published elsewhere in today's Federal Register. Pursuant to that definition, an inmate shall be deemed to be making satisfactory progress toward earning a GED credential or high school diploma unless and until the inmate receives a progress assignment confirming that the inmate refuses to

enroll in the literacy program, that the inmate has been found to have committed a prohibited act that occurred in a literacy program during the last 240 hours of the inmate's most recent enrollment in the literacy program, or that the inmate has withdrawn from the literacy program. An inmate who receives a progress rating that the inmate is not making satisfactory progress shall be deemed to be making satisfactory progress only after the inmate has received a new progress assignment that the inmate has been continuously enrolled in a literacy program for a minimum of 240 instructional hours. Any further withdrawal or finding that the inmate has committed a prohibited act that occurred in a literacy classroom during the last 240 instructional hours of the literacy program shall result in a progress assignment indicating that the inmate is again not making satisfactory progress.

An inmate who is subject to the requirements of VCCLEA (i.e., an inmate who has been convicted of an offense committed on or after September 13, 1994 but before April 26, 1996) therefore may have his or her good conduct time vest if he or she possesses a high school diploma, a GED credential, or is making satisfactory progress toward attaining a GED. An inmate who is subject to the PLRA (i.e., an inmate who has been convicted of an offense committed on or after April 26, 1996) is awarded credit upon Bureau consideration whether the inmate has earned or is making satisfactory progress toward earning a high school diploma or an equivalent degree. By statute, good conduct time awarded to such inmate does not vest until the inmate is released from custody. The

Bureau has determined (see new § 523.20) that when a PLRA inmate has not earned a high school diploma and is not making satisfactory progress toward earning a GED credential, the inmate shall be awarded 42 days of good conduct time rather than 54 days (prorated when the time served by the inmate during the year is less than a full year). The amount of good conduct time to be awarded is also subject to disciplinary disallowance.

The Bureau is publishing this regulation as an interim rule in order to solicit public comment. Members of the public may submit comments concerning this rule by writing to the previously cited address. Comments received before expiration of the deadline will be considered before the rule is finalized. Comments received after expiration of the deadline will be considered to the extent practicable.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866, and accordingly this rule was not reviewed by the Office of Management and Budget pursuant to E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), does not have a significant economic impact on a substantial number of small entities, within the meaning of the Act. Because this rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, its economic impact is limited to the Bureau's appropriated funds.

List of Subjects in 28 CFR Part 523

Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 523 in subchapter B of 28 CFR, chapter V is amended as set forth below.

SUBCHAPTER B—INMATE ADMISSION, CLASSIFICATION, AND TRANSFER

PART 523—COMPUTATION OF SENTENCE

1. The authority citation for 28 CFR part 523 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3568 (repealed November 1, 1987 as to offenses committed on or after that date), 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 4161-4166 (repealed October 12, 1984 as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

2. A new subpart C, consisting of § 523.20, is added to read as follows:

Subpart C—Good Conduct Time

28 CFR § 523.20

§ 523.20 Good conduct time.

Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year. The amount to be awarded is also subject to disciplinary disallowance (see Tables 3 through 6 in § 541.13 of this chapter). Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after April 26, 1996, the Bureau shall consider whether the inmate has earned, or is making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential before awarding good conduct time credit.

(a) When considering good conduct time for an inmate serving a sentence for an offense committed on or after April 26, 1996, the Bureau shall award:

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress

toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(b) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see Tables 3 through 6 in § 541.13 of this chapter).

68 Fed. Reg. 37776 (June 25, 2003)

PROPOSED RULES

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 523

[BOP-1112-P]

RIN 1120-AB12

Good Conduct Time: Aliens With Confirmed Orders of Deportation, Exclusion, or Removal

Wednesday, June 25, 2003

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes to amend its rules on Good Conduct Time (GCT). The purpose of this proposed rule is to more effectively reduce the lengthy General Educational Development (GED) waiting lists and to reevaluate the "satisfactory progress in a literacy program" provision of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) and/or the Prison Litigation Reform Act of 1995 (PLRA) for aliens with confirmed orders of deportation, exclusion, or removal. This proposed rule will increase the

proportion of our literacy funds and resources that go to inmates who will remain in the U.S. after release.

This proposed rule will exempt such inmate aliens from the "satisfactory progress in a literacy program" provision of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) and/or the Prison Litigation Reform Act of 1995 (PLRA). The Bureau's Literacy Program rules currently comprise only GED attainment. This means that inmate aliens who have confirmed orders of deportation, exclusion, or removal, but do not have a high school diploma or GED, will not need to demonstrate satisfactory progress toward earning a GED credential to be considered for the full benefits of GCT. When considering GCT, we propose to allow 54 days GCT for each year served if the inmate is an alien with a confirmed order of deportation, exclusion, or removal from the Immigration and Naturalization Service (INS) (now referred to as the Bureau of Citizenship and Immigration Services (BCIS)).

In this document, we also propose to reorganize the rule for clarity and accuracy. Other than the substantive change regarding sentenced deportable aliens, we make no further substantive changes.

DATES: Comments are due by August 25, 2003.

ADDRESSES: Submit comments to Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah

Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION:

What Is the Purpose of This Rule Change?

The purpose of this proposed rule is to more effectively reduce the lengthy General Educational Development (GED) waiting lists and to reevaluate the "satisfactory progress in a literacy program" provision of VCCLEA/PLRA for aliens with confirmed orders of deportation, exclusion, or removal. This proposed rule will increase the proportion of our literacy funds and resources that go to inmates who will remain in the U.S. after release.

VCCLEA/PLRA requires that inmates lacking a high school diploma or GED must participate satisfactorily in the literacy program to receive full benefits of GCT.

In November 1997, the Bureau's education staff implemented the literacy provision of VCCLEA and PLRA (see 28 CFR 544.70-544.75). Inmates sentenced under either of these two laws must enroll or re-enroll in a literacy program and make satisfactory progress towards earning a GED credential. If they do not do this, inmates may suffer negative consequences to their GCT credit. For PLRA inmates, this would mean not being eligible for the maximum, 54 days, of GCT (see 28 CFR 523.20(a)(1)). For VCCLEA inmates, this would result in their GCT not vesting.

Although we made extensive efforts to enroll as many inmates in literacy programs as possible, the waiting lists for enrollment in these programs grew from no appreciable waitlist in August 1997 to 11,397 in April 2003. Aliens with confirmed deportation orders represent a small fraction of all VCCLEA/PLRA sentenced inmates without a verified GED. On April 14, 2003, 6% of all VCCLEA/PLRA sentenced inmates without a verified GED were aliens with confirmed deportation orders (2,390 out of 39,562).

18 U.S.C. 3624(b)(4) gives the Director authority to make exemptions to the GED requirements as he deems appropriate. Through our literacy program, we help inmates compete for available jobs and cope with post-release community, family, and other responsibilities. Because we must concentrate our resources on inmates who will be released into U.S. communities, we will not require inmates with confirmed orders of deportation, exclusion, or removal to participate in the literacy program.

In this proposed rule, we make an exemption to the GED requirements to provide relief to the growing demand for literacy programs by amending 28 CFR 523.20 to allow the full benefit of GCT provisions for aliens with confirmed orders of deportation, exclusion, or removal. These inmates may still participate in the literacy program, even though it will not affect their GCT.

What Is the Bureau Proposing to Change?

We propose to change 28 CFR 523.20(a)(1) on

Good Conduct Time to allow 54 days GCT for each year served if the inmate is an alien with a confirmed order of deportation, exclusion, or removal from the INS (BCIS). We published this rule as an interim final rule on September 26, 1997 (62 FR 50786). We received no public comment on that interim rule. This rulemaking is a change to the same interim rules.

This proposed rule will have the practical effect of exempting aliens with confirmed orders of deportation, exclusion, or removal from participating in the literacy program, as set forth in 28 CFR 544.70-544.75. The Bureau's Literacy Program, described in 28 CFR part 544, subpart H, currently comprises only GED attainment.

Such inmate aliens can vest (VCCLEA) or will retain eligibility for the full benefits of GCT (PLRA) even if they choose not to participate in the literacy program. However, the proposed rule does not prevent any of these inmates from participating in the literacy program.

In this document, we also propose to reorganize the rule for clarity and accuracy. Other than the substantive change regarding sentenced deportable aliens, we make no further substantive changes.

Who Will This Rule Affect?

This proposed rule will affect inmate aliens with confirmed orders of deportation, exclusion, or removal. These inmates will not need to participate in the literacy program to retain the maximum GCT credit of

54 days or to have their GCT vest.

Where Can I Send Comments, and How Will the Bureau Consider Them?

You can send written comments on this proposed rule to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

We will consider comments we receive during the comment period before we take final action. In light of comments we receive, we may change the proposed rule.

We do not plan to have oral hearings on this proposed rule. All the comments we receive will remain on file for public inspection at the above address.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Director of the Bureau of Prisons has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct

effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications for which we would prepare a federalism assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: this rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local and tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take action under the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an

annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 523

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

Under the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons, we propose to amend 28 CFR part 523 as follows.

SUBCHAPTER B—INMATE ADMISSION, CLASSIFICATION, AND TRANSFER

PART 523—COMPUTATION OF SENTENCE 1. The authority citation for 28 CFR part 523 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3568 (repealed November 1, 1987, as to offenses committed on or after that date), 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 4161-4166 (repealed October 12, 1984, as to offenses committed on or after

November 1, 1987), 5006-5024 (Repealed October 12, 1984, as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510.

28 CFR § 523,20

2. Revise § 523.20 to read as follows:

28 CFR § 523,20

§ 523.20 Good conduct time.

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award:

(1) 54 days credit for each year served (prorated when the time served by the inmate for the

sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development (GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

70 Fed. Reg. 66752 (Nov. 3, 2005)

RULES AND REGULATIONS

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 523

[BOP-1112-F]

RIN 1120-AB12

Good Conduct Time: Aliens With Confirmed Orders of Deportation, Exclusion, or Removal

Thursday, November 03, 2005

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) amends its rules on Good Conduct Time (GCT). The purpose of this rule is to more effectively reduce the lengthy General Educational Development (GED) waiting lists and to reevaluate the "satisfactory progress in a literacy program" provision of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) and/ or the Prison Litigation Reform Act of 1995 (PLRA) for aliens with confirmed orders of deportation, exclusion, or removal. This rule will increase the proportion of our literacy funds and

resources that go to inmates who will remain in the U.S. after release. This rule will exempt inmate aliens with confirmed orders of deportation, exclusion, or removal from the "satisfactory progress in a literacy program" provision of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) and/ or the Prison Litigation Reform Act of 1995 (PLRA). The Bureau's Literacy Program rules formerly comprised only GED attainment. This means that inmate aliens who have confirmed orders of deportation, exclusion, or removal, but do not have a high school diploma or GED, will not need to demonstrate satisfactory progress toward earning a GED credential to be considered for the full benefits of GCT. When considering GCT, we will allow 54 days GCT for each year served if the inmate is an alien with a confirmed order of deportation, exclusion, or removal from the Executive Office for Immigration Review (EOIR).

In this document, we also reorganize the rule for clarity and accuracy. Other than the substantive change regarding sentenced deportable aliens, we make no further substantive changes.

DATES: This rule is effective December 5, 2005.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION: We published this change as a proposed rule on June 25, 2003 (68 FR 37776).

What Is the Purpose of This Rule Change?

The purpose of this rule is to more effectively reduce the lengthy General Educational Development (GED) waiting lists and to reevaluate the "satisfactory progress in a literacy program" provision of VCCLEA/PLRA for aliens with confirmed orders of deportation, exclusion, or removal. This rule will increase the proportion of our literacy funds and resources that go to inmates who will remain in the U.S. after release.

VCCLEA/PLRA requires that inmates lacking a high school diploma or GED must participate satisfactorily in the literacy program to receive full benefits of GCT.

In November 1997, the Bureau's education staff implemented the literacy provision of VCCLEA and PLRA (see 28 CFR 544.70-544.75). Inmates sentenced under either of these two laws must enroll or re-enroll in a literacy program and make satisfactory progress towards earning a GED credential. If they do not do this, inmates may suffer negative consequences to their GCT credit. For PLRA inmates, this would mean not being eligible for the maximum, 54 days, of GCT (see 28 CFR 523.20(a)(1)). For VCCLEA inmates, this would result in their GCT not vesting.

Although we made extensive efforts to enroll as many inmates in literacy programs as possible, the waiting lists for enrollment in these programs grew from no appreciable waitlist in August 1997 to 12,829 in January 2004. Aliens with confirmed deportation orders represent a small fraction of all VCCLEA/PLRA

sentenced inmates without a verified GED. On January 7, 2004, six percent of all VCCLEA/PLRA sentenced inmates without a verified GED were aliens with confirmed deportation orders (2,383 out of 41,892).

18 U.S.C. 3624(b)(4) gives the Director authority to make exemptions to the GED requirements as he deems appropriate. Through our literacy program, we help inmates compete for available jobs and cope with post-release community, family, and other responsibilities. Because we must concentrate resources on inmates who will be released into U.S. communities, we will not require inmates with confirmed orders of deportation, exclusion, or removal to participate in the literacy program.

In this rule, we make an exemption to the GED requirements to provide relief to the growing demand for literacy programs by amending 28 CFR 523.20 to allow the full benefit of GCT provisions for aliens with confirmed orders of deportation, exclusion, or removal. These inmates may still participate in the literacy program, even though it will not affect their GCT.

Comments

We received eight comments. Six were identical form letters in support of the rule change. We respond to the remaining two comments below.

One commenter recommended that the Director provide an exemption for any inmate currently subject to a detainer for later determination of deportability.

The commenter states that this would allow inmates who know that they will be found deportable to request the exemption, thus freeing space in the GED program for inmates who will be released within the U.S.

We considered this option and decided against creating an exemption for inmates subject to a detainer pending a hearing to determine deportability. If the Bureau of Prisons allows such an exception for inmates with detainers, but the Department of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE) determines that the inmate cannot be removed to the country of origin, there are two possible consequences for that inmate: (1) The inmate may have to be on a GED waiting list for an indeterminate amount of time, possibly not getting into the program until close to the expiration of his/her sentence; and/or (2) Any good conduct time earned by the inmate under the exception would have to be forfeited to the extent that it exceeded the good conduct time that inmate would have earned had his/her immigration status been known earlier.

In both situations, the inmate faces potentially negative consequences. We determined that it would more likely benefit alien inmates in this situation to accumulate good conduct time and move up in the waitlist or possibly even have the opportunity to benefit from the GED program, while his/her hearing is pending.

Another commenter wanted to know how the rule would affect inmates who are of Cuban citizenship, whose removal from the U.S. cannot be executed, and

who, therefore, will be released into the community. We intend this rule to operate as follows: Any inmate who is subject to an EOIR order of removal, deportation, or exclusion does not need to participate in the GED program to earn the full amount of good conduct time. Therefore, regardless of whether or not that order can actually be executed, the fact of the EOIR order triggers the effect of this rule. However, if DHS re-evaluates the inmate's situation and makes a formal determination that the inmate is no longer subject to an order of removal, deportation, or exclusion, that inmate will then be required to participate in the GED program or be placed on the waitlist to earn the full amount of good conduct time.

For the aforementioned reasons, we finalize the proposed rule without change.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Director of the Bureau of Prisons has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power

and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications for which we would prepare a federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local and tribal governments, or the private sector, to spend $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. We do not need to take action under the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1995

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1995. This rule will not result in an annual effect on the economy of $1000,000,000 or more; a major increase in costs or prices; or significant adverse effects

on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 523

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

Under the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons, we amend 28 CFR part 523 as follows.

Subchapter B—Inmate Admission, Classification, and Transfer

PART 523—COMPUTATION OF SENTENCE

1. The authority citation for 28 CFR part 523 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3568 (repealed November 1, 1987 as to offenses committed on or after that date), 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to conduct occurring on or after November 1, 1987), 4161-4166 (repealed October 12, 1984 as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510.

2. Revise § 523.20 to read as follows:

§ 523.20 Good conduct time.

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress

toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development (GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

BOP's Sentence Computation Manual, Program Statement 5880.28 (excerpt)

g. Good Conduct Time. Subsection 3624(b) states, "(b) Credit toward service of sentence for satisfactory behavior.-- A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time it is received. Credit that has been vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence."

For computation purposes, it is necessary to remember the following about subsection 3624(b):

(1) 54 days of GCT may be earned for each full year served on a sentence in excess of one year, with the GCT being prorated for the last partial year. No GCT can be earned on, or awarded to, a sentence of one year or less.

(2) The BOP has 15 days after the end of each full year served to make a determination as to the amount of the 54 days that shall be awarded. If the BOP makes no decision about the amount of GCT to award in the 15 days at the end of the year just served, then the entire 54 days will be automatically credited to the sentence on the Vested Date. Therefore, before awarding any GCT on the Vested Date, staff shall review the SENTRY disciplinary log to determine if any GCT had been disallowed during the preceding anniversary period. If no GCT was disallowed during the preceding anniversary period, then the GCT SENTRY data base shall be updated with the total amount of GCT possible to earn and a copy of the disciplinary log, as well as a copy of the GCT record (both signed and dated by the ISM staff member making the change and the auditor), shall be placed in the Judgment and Commitment File.

If some or all of the GCT had been disallowed during the preceding anniversary period and no BP-448 (Good Conduct Time Action Notice) has been received by the Vested Date that matches the disciplinary log record, then the disciplinary log shall be used as the official record for disallowing GCT on the Vested Date. A copy of the disciplinary log shall be placed in the Judgment and Commitment File pending receipt of a BP-448 that matches the information on

the disciplinary log. After receipt of the BP-448 the disciplinary log copy shall be destroyed. Again, an updated copy of the SENTRY GCT record (signed and dated by the ISM staff member making the change and the auditor) shall be placed in the Judgment and Commitment File.

Once GCT has been credited, it vests and may not later be disallowed. If good cause exists (e.g., riot, food strike, work stoppage, etc.) or the prisoner commits an act of misconduct (See Program Statement on Inmate Discipline and Special Housing Units) that occurred during the prior year but does not become known until after the 15 day time limit has expired, however, then the GCT may be disallowed even though the time limit has been exceeded. In addition, if an act of misconduct is referred to the Discipline Hearing Officer (DHO) and the DHO is unable to dispose of the referral in the manner prescribed by the Program Statement on Inmate Discipline and Special Housing Units within the 15 days allowed, then the official award or disallowance of the GCT may be delayed for the period of time necessary to comply with that Program Statement.

In any case not covered in the preceding paragraph in which GCT is not disallowed within the proper time limit, the RISA should be contacted for instructions. (3) GCT that is disallowed and that is not awarded from the maximum possible to award during the 15 day time limit, may not be awarded at a later time. If a disallowance of GCT is successfully appealed, or if the BOP has for some reason erroneously disallowed GCT, then the GCT may be credited at that

time.

(4) The BOP has six weeks before the end of the sentence to make a determination about how much of the prorated GCT to award for the last portion of a year of the term of imprisonment. If the BOP makes no decision about the amount of GCT to award in the last six weeks of the sentence, then the entire amount possible to award for that period of time will be automatically credited to the sentence on the last day of the sentence (date of release and Vested Date). Therefore, before awarding any GCT on the Vested Date, staff shall review the SENTRY disciplinary log to determine if any GCT had been disallowed during the preceding anniversary period. If no GCT was disallowed during the preceding anniversary period, then the GCT SENTRY data base shall be updated with the total amount of GCT possible to earn and a copy of the disciplinary log, as well as a copy of the GCT record (signed and dated by the ISM staff member making the change and the auditor), shall be placed in the Judgment and Commitment File.

If some or all of the GCT had been disallowed during the preceding anniversary period and no BP-448 has been received by the Vested Date that matches the disciplinary log record, then the disciplinary log shall be used as the official record for disallowing GCT on the Vested Date. A copy of the disciplinary log shall be placed in the Judgment and Commitment File pending receipt of a BP-448 that matches the information on the disciplinary log. After receipt of the BP-448 the disciplinary log copy shall be destroyed. Again, an updated copy of the SENTRY GCT record

(signed and dated by the ISM staff member making the change and the auditor) shall be placed in the Judgment and Commitment File.

(5) An action to delay, disallow or suspend the award of some or all of the GCT for a decision at a later time that is not within the 15 day, or six week, consideration time periods is not authorized.

For release purposes, subsection 3624(b) is the most important provision in the computation process since the proper application of that subsection determines the actual statutory date of release for the prisoner. The release date is determined, of course, by subtracting the *total* amount of GCT awarded during the term of the sentence from the full term date of the sentence. The total amount of GCT awarded during the term of a sentence is found by adding the amount of GCT awarded at the end of each year to the amount of GCT awarded for the last portion of a year.

As noted in (1) above, 54 days of GCT may be awarded for each full year served on a sentence in excess of one year. Since 54 days of GCT per year cannot be divided evenly into one year, or 12 months, or 52 weeks, or 365 days, determining the amount of GCT that may be awarded for the last portion of a year on the sentence becomes arithmetically complicated. The BOP has developed a formula (hereinafter called the "GCT formula") that best conforms to the statute when calculating the maximum number of days that may be awarded for the time served during the last portion of a year on the sentence.

The GCT formula is based on dividing 54 days (the maximum number of days that can be awarded for one year in service of a sentence) into one day which results in the portion of one day of GCT that may be awarded for one day served on a sentence. 365 days divided into 54 days equals .148. Since .148 is less than one full day, no GCT can be awarded for one day served on the sentence. Two days of service on a sentence equals .296 (2 x .148) or zero days GCT; three days equals .444 (3 x .148) or zero days GCT; four days equals .592 (4 x .148) or zero days GCT; five days equals .74 (5 x .148) or zero days GCT; six days equals .888 (6 x .148) or zero days GCT; and seven days equals 1.036 (7 x .148) or 1 day GCT. The fraction is always dropped.

Since, in accordance with the statute (18 USC § 3624(b)), no GCT can be awarded to a sentence of one year or less, then the very shortest sentence that can be awarded GCT is a sentence of 1 year and 1 day. Because a prisoner would accrue GCT while serving a sentence of 1 year and 1 day and, therefore, serve something less than the full sentence, it would be impossible to accrue the full 54 days of GCT for a sentence of 1 year and 1 day. As a result, the GCT formula previously discussed must be utilized as shown below to determine the amount of GCT to award for a partial year. This method of calculating the GCT possible to award for the last portion of a year of a sentence to be served must be followed in all partial year calculations. (For the purpose of this demonstration, the sentence of 1 year and 1 day equals 366 days.)

Step No. 1

Sentence = 366 - 54 = 312 days

312 days served does not equal 54 days of GCT but does equal 46 days.

Step No. 2

Days Served = 312 x .148 = 46.176 = 46 days GCT

Subtracting 46 days from the sentence of 366 days results in 320 days to be served.

Step No. 3

Sentence = 366 - 46 = 320 days

46 days of GCT is not enough because 46 plus 312 days to be served equals a sentence of 358 days, 8 days short of a sentence of 366 days (1 year and 1 day).

Step No. 4

Time Served = 312 + 46 = 358 days

Comparing 320 days to serve, which is too much time to serve, with 312 days to serve, which is not enough time to serve, reveals that the amount of GCT that can be earned must fall somewhere between 54 and 46 days. As a result, the next step is to determine how much GCT can be earned on 320 days served.

Step No. 5

Time Served = 320 x .148 = 47.36 = 47 days GCT

Subtracting 47 days from the sentence of 366 days (1 year and 1 day) results in 319 days to be served.

Step No. 6

Sentence = 366 - 47 = 319 days

Utilizing the GCT formula, it is learned that 319 days served equals 47 days GCT.

Step No. 7

Time Served = 319 x .148 = 47.212 = 47 days GCT

Adding 319 days time served to 47 days GCT does equal a sentence of 366 days (1 year and 1 day).

Step No. 8

Time Served = 319 + 47 = 366 days

The amount of GCT that can be awarded for a sentence of 366 days (1 year and 1 day) is 47 days.

The steps that were followed in the preceding example must be followed in every instance when it is necessary to determine the amount of GCT that can be awarded for a partial year served on a sentence. A short version of the preceding eight steps is shown below.

366 x .148 = 54.168 (366 + 54 = 420)

366 - 54= 312 x .148 = 46.176 (312 + 46 = 358)
366 - 46= 320 x .148 = 47.36 (320 + 47 = 367)
366 - 47= 319 x .148 = 47.212 (319 + 47 = 366)

Thus–319 days actually served plus 47 days of GCT equals 366 days, or a sentence of 1 year and 1 day.

There is one exception to the "fraction is always dropped" rule. For instance, if the partial year remaining on a sentence equals 7 days and if the full 7 days were served, then 1 day of GCT credit (7 x .148 = 1.036 = 1 day) could be awarded. If the 1 day is awarded, however, then only 6 days would actually be served on the final 7 days and for 6 days served no GCT (6 x .148 = .888 = 0 days) would be authorized. This arithmetical conflict occurs each time that the actual time to serve plus the GCT equals 1 day less than that final portion of the year remaining on the sentence. For example, applying the GCT formula to a final portion of a year of 294 days results in the following calculation.

294 x .148 = 43.512 (294 + 43 = 337)
294 - 43= 251 x .148 = 37.148 (251 + 37 = 288)
294 - 37= 257 x .148 = 38.036 (257 + 38 = 295)
294 - 38= 256 x .148 = 37.888 (256 + 37 = 293)

As you can see from above, the GCT formula does not produce a result that will allow the number of days actually served plus the GCT to equal 294 days. Since it is to the advantage of the prisoner to award an additional full day for 37.888 days (38 days instead of 37 days) of GCT in such a situation, the BOP will

award that additional 1 full day even though the time served results in a fraction (.888 in this case) short of a full day. (See Good Conduct Time Chart)

It is essential to learn that GCT *is not* awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served. In other words, when the GCT awarded plus the number of days actually served equals the days remaining on the sentence, then the prisoner shall be released on the date arrived at in the computation process (days remaining on sentence - (GCT + days served) = release date). The following example demonstrates the computation process for determining a final release date on a sentence with 355 days remaining and that has a 10-10-91 date of release prior to the award of GCT.

355 x .148 = 52.54 (355 + 52 = 407)
355 - 52= 303 x .148 = 44.844 (303 + 44 = 347)
355 - 44= 311 x .148 = 46.028 (311 + 46 = 357)
355 - 46= 309 x .148 = 45.172 (309 + 45 = 354)
355 - 45= 310 x .148 = 45.88 (310 + 45 = 355)

Release Date	= 10-10-91	= 19276
GCT		= -00045
Final Release Date	= 08-26-91	= 19231

Based on the partial year formula, any sentence that equals 418 days (e.g., 1 year, 1 month and 21 days) through 425 days (e.g., 1 year, 1 month and 29 days), can receive 54 days of GCT. Beginning with sentences that equal 426 days, *more* than 54 days of GCT can be awarded. As a result, any sentence that

exceeds 425 days will require an Anniversary Date and a prorated year computation.

Now that the method for finding the release date for a partial year has been shown, the following example demonstrates the calculation of a sentence of 1 year and 1 month with no jail time credit or inoperative time.

Date Sentence Began		90-06-23	
Sentence Length	= +	01-01-00	
Full Term Date		91-07-22* =	19196
Date Sentence Began		90-06-22* =	-18801
Days Remaining			395

395 x .148 = 58.46 (395 + 58 = 453)
395 - 58= 337 x .148 = 49.876 (337 + 49 = 386)
395 - 49= 346 x .148 = 51.208 (346 + 51 = 397)
395 - 51= 344 x .148 = 50.912 (344 + 50 = 394)
395 - 50= 345 x .148 = 51.06 (345 + 51 = 396)

You will note that the GCT formula does not allow the GCT plus the days served (344 + 50 = 394 and 345 + 51 = 396) to equal the days remaining on the sentence (395). As a result, in accordance with the exception to always "dropping the fraction" rule, 51 days of GCT is awarded for the partial year rather than 50 days. More examples follow at the end of this chapter that demonstrate all the elements of a sentence that can result from a sentence to a term of imprisonment.

The next step in the calculation process of a sentence is to determine the "Vested Date", sometimes

incorrectly referred to as the "Anniversary Date." The Anniversary Date is the date after one full year has been served on a sentence. The Vested Date is the date that is 15 days beyond the last day served on a full year and, in the case of a partial year, the last day of the sentence. As noted in 18 U.S.C. § 3624(b) (quoted in its entirety above), the BOP has 15 days after the end of each full year served on the sentence to decide how much of 54 days GCT shall be awarded and six weeks before the end of the sentence to determine the prorated amount of GCT that shall be awarded. Staff shall review appropriate documentation and award the proper amount of GCT accordingly within the 15 day or last six weeks consideration period.

Staff may enter any number of days desired into the SENTRY data base at any time, except on the Vested Date, to learn a prisoner's projected release date for release planning purposes. This type of entry into the SENTRY data base does not constitute a vested award of GCT.

In order to determine the Vested Date, the release date with the maximum possible amount of GCT to award must be learned. Learning this information is necessary to make a determination about whether the fifteen days or the six weeks, or both, need to be known to decide the amount of GCT to award.

Beginning with a sentence that is 7 days longer than the last full year that is served on a sentence that is eligible for GCT through a sentence that is 65 days longer than the last full year served on a sentence that

is eligible for GCT, there is, or needs to be an overlapping of the 15 days and six weeks GCT consideration time. In other words, during such times, and sometimes at the same time, consideration must be given for both the amount of GCT to award for one full year of service on the sentence and for a partial year. For example, a sentence of 1 year, 2 months and 2 days imposed on 01-10-88 would have a full term date of 03-11-89. If the full 15 days were used to decide that 54 days GCT should be awarded, the 15 days (Vested Date) would expire on 01-24-89. The release date would be 01-16-89, 8 days before the award could be made. In addition, no consideration would have been given for the 7 days served over one year for which 1 day of GCT could be awarded, thus frustrating and nullifying the very reason for which the six week consideration period of time was statutorily devised. Remember, failure to award an amount of GCT less than the amount that can be awarded on the Vested Date then requires that the full amount possible to award must be credited.

In order to overcome the problem just described and to give staff ample time to make proper decisions about the amount of time to award, a system that accommodates both the 15 days and six weeks, called "overlapping" has been developed.

Considering the amount of time to award can begin at any time, but the official award must be made within the time frame (15 days or six weeks) required by the statute. As stated earlier, the official award of GCT need not be made until the last possible day to make the award allowed by statute. If ISM staff follow

this practice, it will allow time to change the proposed amount to award up to and including the final day that the award can be made, including the date of release for a partial year. If, of course, any GCT is disallowed during the partial year, then it is necessary to make the actual award of the balance of the GCT to be awarded **on** the original date calculated for release. **No GCT** may be disallowed during the service of the disallowed GCT. **No GCT** shall be awarded for the time spent serving the disallowed GCT.

Following are some examples that demonstrate overlapping situations.

EXAMPLE NO. 1

Sentence = 1 Yr 2 Mos 1 Dy DSB = 01-10-89
Full Term Date = 03-10-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	12-05-89	01-15-90

Maximum to Award	Actual Award	Running Total	Release Date 03-10-90
54	54	54	01-15-90

In the above example, the sentence is 1 year, 2 months and 1 day. The statutory six weeks consideration period is used since to use the full 15 days (01-10-90 (Anniversary Date) through 01-24-90) after one full year of service on the sentence would result in a release date (01-15-90) that would be ten days before the final date of the 15 days (01-24-90). Since there is no preceding year on which GCT was eligible to be awarded, only one Vested Date (01-15-90) needs to be established. When six weeks are used, the last day of the six weeks (Vested Date) will always be the award date and the award will always be the release date as long as the full amount possible to award is given.

EXAMPLE NO. 2

Sentence = 1 Yr 2 Mos 2 Dys DSB = 01-10-89
Full Term Date = 03-11-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	12-05-89	01-15-90
	12-05-89	01-15-90

Maximum to Award	Actual Award	Running Total	Release Date 03-11-90
54	54	54	01-16-90
1	1	55	01-15-90

In the above example, the sentence is 1 year, 2 months and 2 days. This example demonstrates the very first sentence where overlapping occurs. It shows that consideration for the full 54 days and 1 day of GCT as beginning six weeks before the anticipated release date. If the full 15 days (01-10-90 through 01-24-90) for the 54 days were used, then the release date would have passed (01-16-90) before the award would have been made on 01-24-90. Of course, consideration to award the 54 days could have been accomplished during 01-10-90 through 01-15-90 with the award being made on 01-15-90, and the 1 day of GCT could have been considered during the same time period with the actual award being made on 01-15-90. There is no

reason to limit the consideration period to such a short time frame. That short period of time is the reason for calculating the "Consideration Begins" date far enough in advance to allow staff ample time to consider the award without undue pressure from a shrinking release date. This system gives staff the optimum amount of time to consider and reconsider whether to award all or part of the maximum possible GCT that can be awarded.

EXAMPLE NO. 3

Sentence = 1 Yr 2 Mos 10 Dys DSB = 01-10-89
Full Term Date = 03-19-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	12-12-89	01-22-90
	12-12-89	01-22-90

Maximum to Award	Actual Award	Running Total	Release Date 03-19-90
54	54	54	01-24-90
2	2	56	01-22-90

In the above example, the sentence is 1 year, 2 months and 10 days. This example again shows the "Consideration Begins" date as being six weeks in advance of the release date to give consideration for the 2 days of GCT. You will note from this example that by using the same "Consideration Begins" date for the 54 days that more than six weeks exists. In order to give staff a full six weeks in which to award consider the amount of prorated GCT to award on the partial year at the end of the sentence, it is necessary to expand the consideration time for the 54 days that can be awarded for the year just passed. The consideration time for the year just passed will continue to expand until such time that the full 15 days provided by

statute can be utilized without cutting into the six weeks that is statutorily authorized for the partial year at the end of the sentence (Example No. 7).

EXAMPLE NO. 4

Sentence = 1 Yr 2 Mos 13 Dys DSB = 01-10-89
Full Term Date = 03-22-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	12-15-89	01-24-90
	12-15-89	01-25-90

Maximum to Award	Actual Award	Running Total	Release Date 03-22-90
54	54	54	01-27-90
2	2	56	01-25-90

In the above example, the sentence is 1 year, 2 months and 13 days. This example shows that there is now actually enough time to utilize the full 15 days (01-10-90 through 01-24-90) to award 54 days for the year just passed without interfering with the eventual release date, but if no consideration time is given for the 2 days of GCT until after the 54 days is awarded on 01-24-90, then there would only be one day (01-25-90) in which to consider and award the 2 days of GCT for the partial year. Since the statute allows six weeks in which to award the final 2 days of GCT for the partial year, a "Consideration Begins" date that is six weeks in advance of the earliest potential release date has been established for both the 54 days and 2 days to, again,

give staff ample time to make a proper decision about the GCT and to put off making the actual award until the very latest possible date. Putting off the award to the last possible moment, as stated earlier, provides staff with the time to reconsider the amount of GCT to award up to the maximum date possible (01-24-90 for the 54 days and the release date of 01-25-90 for the 2 days). So, beginning with sentences of 1 year, 2 months and 13 days, the amount of time for consideration of the 54 days begins to diminish since the maximum date to award expires on 01-24-90, i.e., one full year of service of the sentence beyond one year expires on 01-09-90 and the statute authorizes 15 days (01-10-90 through 01-24-90) after that year is over to award the GCT, some or all of it.

EXAMPLE NO. 5

Sentence = 1 Yr 3 Mos 14 Dys DSB = 01-10-89
Full Term Date = 04-23-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	01-10-90	01-24-90
	01-12-90	02-22-90

Maximum to Award	Actual Award	Running Total	Release Date 04-23-90
54	54	54	02-28-90
6	6	60	02-22-90

In the above example, the sentence is 1 year, 3 months and 14 days. This example shows that the "Consideration Begins" date for the year just passed and the final partial year are now two days different. This difference is so because the time period to award GCT for the year just passed begins the day after (01-10-90) and runs through the 15th day after (01-24-90) and the time period to award GCT for the partial year begins six weeks in advance (01-12-90) of the release date and runs through the date of release of 02-22-90. Since these time periods overlap, staff can consider how much of the 54 days and the 6 days to award on the Vested Dates during the time in which the consideration time overlaps, or staff can consider each separately during the dates shown.

EXAMPLE NO. 6

Sentence = 1 Yr 3 Mos 26 Dys DSB = 01-10-89
Full Term Date = 05-05-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	01-10-90	01-24-90
	01-22-90	03-04-90

Maximum to Award	Actual Award	Running Total	Release Date 05-05-90
54	54	54	03-12-90
8	8	62	03-04-90

In the above example, the sentence is 1 year, 3 months and 26 days. This example demonstrates that as the sentence length for the partial year at the end of the sentence becomes longer, the overlap of the 15 days and the six weeks becomes shorter. In this example, the overlap period is only three days. Staff must keep in mind that if consideration for the 54 days and 8 days is made at the same time, then there would only be three days (01-22-90 through 01-24-90) in which to award the 54 days, or some part thereof. It should also be borne in mind that the last 8 days, and the time period in which to consider it, only becomes valid after the preceding action for the 54 days is complete. If any amount of GCT less than the 54 days is awarded in the

preceding year, then the dates, and possibly the amount of GCT, for the final partial year will change.

EXAMPLE NO. 7

Sentence = 1 Yr 3 Mos 29 Dys DSB = 01-10-89
Full Term Date = 05-08-90

Anniversary Date	Consideration Begins	Vested Date
01-10-90	01-10-90	01-24-90
	01-25-90	03-07-90

Maximum to Award	Actual Award	Running Total	Release Date 05-08-90
54	54	54	03-15-90
8	8	62	03-07-90

In the above example, the sentence is 1 year, 3 months, and 29 days. This example shows that beginning with sentences that have 65 days remaining to be served on the final partial year after GCT has been awarded for the year just passed, that there is no overlap of the 15 days for the preceding year and the six weeks for the partial year. The award for the 54 days can be made at any time from 01-10-90 through 01-24-90, but the award for the 8 days should not be made until the actual release date so that staff can reconsider how much, if any, of the 8 days to award up to, and including, the date of release. Remember, once official action is taken to award the GCT, it cannot be revoked, modified, reduced, suspended, or otherwise altered or changed in any way.

EXAMPLE NO. 8

Sentence = 4 Yrs DSB = 01-10-89
Full Term Date = 01-09-93

Anniversary Date	Consideration Begins	Vested Date
01-10-90	01-10-90	01-24-90
01-10-91	01-10-91	01-24-91
01-10-92	01-10-92	01-24-92
	05-25-92	07-05-91

Maximum to Award	Actual Award	Running Total	Release Date 01-09-93
54	54	54	11-16-92
54	54	108	09-23-92
54	54	162	07-31-92
26	26	188	07-05-92

In the above example, the sentence is 4 years. This example shows a sentence with a number of Vested Dates with no overlapping of the 15 days at the end of the service of a full year and the six weeks at the end of the sentence.

EXAMPLE NO. 9

Sentence = 7 Yrs DSB = 01-10-89
Full Term Date = 01-09-96

Anniversary Date	Consideration Begins	Vested Date
01-10-90	01-10-90	01-24-90
01-10-91	01-10-91	01-24-91
01-10-92	01-10-92	01-24-91[sic]
01-10-93	01-10-93	01-24-93
01-10-94	01-10-94	01-24-94
	01-04-95	01-24-95
	01-04-95	02-14-95

Maximum to Award	Actual Award	Running Total	Release Date 01-09-96
54	54	54	11-16-95
54	54	108	09-23-95
54	54	162	07-31-95
54	54	216	06-07-95
54	54	270	04-14-95
54	54	324	02-19-95
5	5	329	02-14-95

In the above example, the sentence is 7 years. This example shows a sentence with a number of Vested Dates and with an overlapping of the consideration time for the 54 days and 5 days of GCT. This overlapping of consideration time, explained before and shown in previous examples, results from the fact that there is 41 days (which falls in the 7 through 65 days range) left to be served on the final partial year of the sentence to be served before the award of the 5 days of GCT is made.

The above system administratively establishes a method that accommodates the statutory provisions in 18 USC § 3624(b) and allow staff the consideration time necessary to make proper awards of GCT.

The following is a guide to assist in monitoring Good Conduct Time Awards.

a. Disallowance of GCT is determined by the DHO based on a finding that an inmate committed a prohibited act. The DHO's decision is final and subject only to procedural review by the Warden and inmate appeal through the Administrative Remedy procedures.

b. The DHO will forward the completed Good Conduct Time Action Notice (BP-448) to the Warden for procedural review. After review, the form will be distributed as follows: original to ISM for action and filing in the Judgment and Commitment file, and one copy to the inmate's Unit Manager for filing in the Central File.

c. Prior to the beginning of each month, ISM staff will execute a SENTRY Population Monitoring Transaction to identify all inmates who have a Vested Date during the following month. The ISM staff member keying in the information will sign the Good Time Data Sheet.

d. During the 15 days after the Anniversary Date, ISM staff will review the J&C File for any GCT disallowances during the previous year. ISM staff will determine the actual number of days to be awarded by subtracting any GCT disallowances from the maximum amount of 54 GCT days. ISM staff should also determine if there are any pending DHO decisions which may result in GCT disallowances for the previous year. Normally, ISM staff will enter the number of days of Good Conduct Time into SENTRY on

the Vested Date, or the last normal work day prior to the Vested Date.

e. If a Good Conduct Time Action Notice (BP-448) has not been received by the Vested Date, then the Disciplinary Log shall be used as the official record for disallowing GCT on the Vested Date. A copy of the disciplinary log shall be placed in the J&C File pending receipt of a BP-448 that matches the information on the disciplinary log. After receipt of the BP-448, the disciplinary log copy shall be destroyed.

f. For partial year awards, ISM staff will enter the final GCT award into SENTRY on the inmate's release date prior to the final satisfaction of the sentence. The final GCT award should be made on the inmate's release date, or the work day preceding the release date since awards of GCT are vested and may not later be disallowed. If the time remaining on the sentence is less than a year, a prorated amount of Good Conduct Time will be entered into SENTRY. This also includes shorter sentences up to and including a sentence of 417 days (usually equaling 1 year, 1 month and 1 day), which do not earn the full amount of 54 GCT days, but earn a lesser prorated amount. Inmates serving SRA sentences are not eligible for lump sum awards of GCT.

g. Community Corrections staff will perform the above procedures for prisoners in community correction centers. The Disciplinary Log need not be produced for prisoners who are boarded out to state facilities or who are serving their sentences concurrently in a state facility.

OM 127-88_EMS OM 127-88 (5883), 11/7/88 - Good Conduct Time Credit Under 18 U.S. Code, Section 3624 (B) (caps in original)

BUREAU OF PRISONS , CENTRAL OFFICE

DATE: NOVEMBER 7, 1988

TO: ALL CHIEF EXECUTIVE OFFICERS
ALL REGIONAL LEGAL COUNSEL
ALL REGIONAL INMATE SYSTEMS ADMINISTRATORS AND ISM MANAGERS
ALL COMMUNITY PROGRAMS ADMINISTRATORS AND MANAGERS

FROM: CLAIR A. CRIPE, GENERAL COUNSEL

SUBJECT: EMS OM 127-88 (5883). NOVEMBER 7, 1988, GOOD CONDUCT TIME CREDIT UNDER TITLE 18 U.S. CODE, SECTION 3624 (B).

REFERENCE: PS 5270.7, CN-1, OCTOBER 12, 1988, 'INMATE DISCIPLINE AND SPECIAL HOUSING UNITS'.
ISM SENTENCE COMPUTATION TRAINING MANUAL, 'COMPREHENSIVE CRIME CONTROL ACT OF 1984'.

1. PURPOSE: TO ADVISE STAFF OF THE

PROCEDURES FOR ANNUAL AWARDS OF GOOD CONDUCT TIME CREDIT UNDER TITLE 18 U.S. CODE. SECTION 3624 (B).

2. BACKGROUND: THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (CCCA) ESTABLISHED A NEW FORM OF GOOD TIME CREDIT FOR INMATES SENTENCED UNDER THE CCCA PROVISIONS. THE GOOD TIME, WHICH IS REFERRED TO AS "GOOD CONDUCT TIME" (GCT) IS EARNED ON SENTENCES OF 1 YEAR AND 1 DAY OR MORE AT A RATE OF 54 DAYS FOR EACH YEAR OF TIME SERVED; UNLESS THE BUREAU DETERMINES THAT THE INMATE HAS NOT SATISFACTORILY COMPLIED WITH THE INSTITUTION DISCIPLINARY REGULATIONS. THE STATUTORY AUTHORITY FOR GOOD CONDUCT TIME IS AS FOLLOWS:

TITLE 18, SECTION 3624 (B) - CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.

"A PRISONER WHO IS SERVING A TERM OF IMPRISONMENT OF MORE THAN ONE YEAR, OTHER THAN A TERM OF IMPRISONMENT FOR THE DURATION OF HIS LIFE, SHALL RECEIVE CREDIT TOWARD THE SERVICE OF HIS SENTENCE, BEYOND THE TIME SERVED, OF FIFTY- FOUR DAYS AT THE END OF EACH YEAR OF HIS TERM OF IMPRISONMENT, UNLESS THE BUREAU OF PRISONS DETERMINES THAT, DURING THAT YEAR, HE HAS NOT SATISFACTORILY COMPLIED WITH SUCH

INSTITUTIONAL DISCIPLINARY REGULATIONS AS HAVE BEEN APPROVED BY THE ATTORNEY GENERAL AND ISSUED TO THE PRISONER. IF THE BUREAU DETERMINES THAT, DURING THAT YEAR, THE PRISONER HAS NOT SATISFACTORILY COMPLIED WITH SUCH INSTITUTIONAL REGULATIONS, HE SHALL RECEIVE NO SUCH CREDIT TOWARD SERVICE OF HIS SENTENCE OR SHALL RECEIVE SUCH LESSER CREDIT AS THE BUREAU DETERMINES TO BE APPROPRIATE. THE BUREAU'S DETERMINATION SHALL BE MADE WITHIN FIFTEEN DAYS AFTER THE END OF EACH YEAR OF THE SENTENCE. SUCH CREDIT TOWARD SERVICE OF SENTENCE VESTS AT THE TIME IT IS RECEIVED. CREDIT THAT HAS VESTED MAY NOT LATER BE WITHDRAWN, AND CREDIT THAT HAS NOT BEEN EARNED MAY NOT LATER BE GRANTED. CREDIT FOR THE LAST YEAR OR PORTION OF A YEAR OF THE TERM OF IMPRISONMENT SHALL BE PRORATED AND CREDITED WITHIN THE LAST SIX WEEKS OF THE SENTENCE."

3. ACTION: THE FOLLOWING IS A SUMMARY OF THE PROCEDURES TO BE FOLLOWED FOR AWARDS AND DISALLOWANCES OF GOOD CONDUCT TIME CREDIT (GCT) FOR INMATES COMMITTED UNDER THE SENTENCING REFORM ACT PROVISIONS OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA).

A. EFFECTIVE NOVEMBER 16, 1988, NEW PROCEDURES FOR THE DISALLOWANCE O F

GOOD CONDUCT TIME CREDIT BY THE DISCIPLINARY HEARING OFFICER (DHO) GO INTO EFFECT. THE DISALLOWANCE OF GCT IS BASED UPON A DETERMINATION BY THE DHO THAT AN INMATE COMMITTED A PROHIBITED ACT AS DEFINED IN POLICY. THE DECISION OF THE DHO IS FINAL, AND IS SUBJECT ONLY TO PROCEDURAL REVIEW BY THE WARDEN AND BY INMATE APPEAL THROUGH THE ADMINISTRATIVE REMEDY PROCEDURES. THE DHO IS TO PROVIDE THE INMATE SYSTEMS MANAGER (ISM) WITH DOCUMENTATION OF EACH GOOD CONDUCT TIME DISALLOWANCE (BP-448, GOOD CONDUCT TIME ACTION NOTICE). THE ORIGINAL COPY OF THIS FORM IS MAINTAINED IN THE J&C FILE AND A COPY IN THE CENTRAL FILE. THE GOOD CONDUCT TIME ACTION NOTICES ARE USED BY THE ISM TO DOCUMENT THE NUMBER OF DAYS DISALLOWED BY THE DHO THROUGHOUT THE YEAR AND TO DETERMINE THE ANNUAL AWARD OF GOOD CONDUCT TIME. PLEASE REFER TO PROGRAM STATEMENT 5270.7, 'INMATE DISCIPLINE AND SPECIAL HOUSING UNITS' CN-1 DATED OCTOBER 12, 1988, FOR ADDITIONAL INFORMATION ON DISALLOWANCE OF GOOD CONDUCT TIME.

B. GOOD TIME ACTION DATE - THE GOOD TIME ACTION DATE IS THE DATE UPON WHICH CONSIDERATION BEGINS FOR AWARDING GOOD CONDUCT TIME FOR EACH FULL YEAR IN CUSTODY. THE BUREAU OF PRISONS HAS 15 DAYS AFTER THE END OF EACH FULL YEAR

SERVED TO DETERMINE HOW MUCH OF THE 54 DAYS OF GOOD CONDUCT TIME SHALL BE AWARDED.

FOR EXAMPLE: A 5 YEAR SENTENCE WHICH BEGAN ON NOVEMBER 2, 1988, (WITH NO JAIL TIME CREDIT OR INOPERATIVE TIME), WILL HAVE A GOOD TIME ACTION DATE OF NOVEMBER 2, 1989. THIS IS THE DATE ON WHICH CONSIDERATION BEGINS FOR AN AWARD OF GOOD CONDUCT TIME FOR THE TIME IN CUSTODY FROM NOVEMBER 2, 1988 TO NOVEMBER 1, 1989. WITHIN 15 DAYS FROM THE GOOD TIME ACTION DATE, THE ISM IS TO ENTER THE NUMBER OF DAYS OF GOOD CONDUCT TIME AWARDED INTO SENTRY, USING THE GOOD CONDUCT TIME TRANSACTION. THE ACTUAL NUMBER OF DAYS AWARDED IS DETERMINED BY REVIEWING THE GCT ACTION NOTICES AND SUBTRACTING ANY GCT DISALLOWANCES FROM THE PREVIOUS YEAR FROM THE MAXIMUM AMOUNT OF 54 DAYS GCT. THE ISM SHOULD ALSO DETERMINE IF THERE ARE ANY PENDING DHO DECISIONS WHICH MAY RESULT IN GCT DISALLOWANCES FOR THE PREVIOUS YEAR. THE GOOD TIME ACTION DATE WILL REMAIN THE SAME FOR EACH FULL YEAR IN CUSTODY, UNLESS THE SENTENCE IS ADJUSTED FOR JAIL TIME CREDIT OR INOPERATIVE TIME. (EX. NOV. 2, 1989, NOV. 2, 1990, NOV. 2, 1991 ETC.) PLEASE REFER TO EMS MESSGAE #1281747, 'GOOD CONDUCT TIME'. DATED NOVEMBER 1 1988 FOR THE SENTRY SENTENCE MONITORING TRANSACTIONS TO

ENTER GCT ACTIONS.

IN ADDITION TO THE BUREAU'S DETERMINATION OF GOOD CONDUCT TIME CREDIT AFTER THE END OF EACH YEAR OF THE INMATES SENTENCE, A PRORATED GCT AWARD WILL BE MADE FOR THE PORTION REMAINING ON THE LAST YEAR OF THE SENTENCE. SECTION 3624 (B) PROVIDES THAT '. . . CREDIT FOR THE LAST YEAR OR PORTION OF A YEAR OF THE TERM OF IMPRISONMENT SHALL BE PRORATED AND CREDITED WITHIN THE LAST SIX WEEKS OF THE SENTENCE'. THE SENTRY SENTENCE MONITORING MODULE WILL AUTOMATICALLY COMPUTE A GOOD TIME ACTION DATE FOR THE PORTION OF THE LAST YEAR OF THE SENTENCE , ON THE BASIS OF A PROJECTED RELEASE DATE. ALTHOUGH THE FINAL AWARD OF GOOD CONDUCT TIME MAY BE MADE UP TO SIX WEEKS PRIOR TO THE PROJECTED RELEASE DATE, THE FINAL GCT AWARD SHOULD BE MADE AS CLOSE AS POSSIBLE TO THE ACTUAL RELEASE DATE, SINCE AN AWARD OF GCT IS VESTED AND MAY NOT LATER BE DISALLOWED. THEREFORE, THE ISM SHOULD ENTER THE FINAL GCT AWARD INTO SENTRY ON THE INMATE'S RELEASE DATE, PRIOR TO SATISIFYING THE SENTENCE IN SENTRY.

C. IN SUMMARY, THE FOLLOWING PROCEDURES ARE TO BE FOLLOWED FOR GOOD CONDUCT TIME AWARDS.

1) EFFECTIVE NOVEMBER 16, 1988, DIS-ALLOWANCES OF GOOD CONDUCT TIME ARE DETERMINED BY THE DHO BASED ON A FINDING AN INMATE COMMITTED A PROHIBITED ACT. THE DHO DECISION IS FINAL AND SUBJECT ONLY TO PROCEDURAL REVIEW BY THE WARDEN AND INMATE APPEAL THROUGH THE ADMINISTRATIVE REMEDY PROCEDURES.

2) THE DHO WILL FORWARD THE COMPLETED GOOD CONDUCT TIME ACTION NOTICE (BP-448) TO THE WARDEN FOR PROCEDURAL REVIEW. AFTER REVIEW, THE FORM WILL BE DISTRIBUTED AS FOLLOWS: ORIGINAL TO ISM AND 1 COPY TO THE UNIT.

3) PRIOR TO THE BEGINNING OF EACH MONTH, THE ISM WILL EXECUTE A SENTRY POPULATION MONITORING TRANSACTION TO IDENTIFY ALL INMATES WHO HAVE A GOOD TIME ACTION DATE DURING THE FOLLOWING MONTH. (PLEASE REFER TO EMS MESSAGE #1285601, 'SENTENCE MONITORING FOR GOOD CONDUCT TIME', DATED NOV. 4, 1988, FOR ADDITIONAL INFORMATION ON THIS TRANSACTION.)

4) WITHIN 15 DAYS AFTER THE INMATE'S GOOD TIME ACTION DATE, THE ISM WILL REVIEW THE J&C FILE FOR ANY GCT DISALLOWANCES DURING THE PREVIOUS YEAR. THE ISM IS TO DETERMINE THE ACTUAL NUMBER OF DAYS TO BE AWARDED BY SUBTRACTING ANY GCT DISALLOWANCES FROM THE MAXIMUM

AMOUNT OF 54 DAYS GCT. THE ISM SHOULD ALSO DETERMINE IF THERE ARE ANY PENDING DHO DECISIONS WHICH MAY RESULT IN GCT DISALLOWANCES FOR THE PREVIOUS YEAR. THE ISM IS TO ENTER THE NUMBER OF DAYS OF GOOD CONDUCT TIME AWARDED INTO SENTRY, USING THE GOOD CONDUCT TIME TRANSACTION. IF THE INMATE HAS AN APPEAL OF THE GCT DISALLOWANCE PENDING, THE ISM SHOULD DETERMINE THE YEAR'S AWARD BASED ON THE STATUS AT YEAR END. THIS IS ONE TIME A DISALLOWANCE MAY BE RESTORED; IF ORDERED BY BP-11 APPEAL, OR OTHER EQUIVALENT ACTION.

5) THE ISM WILL PROVIDE THE UNIT STAFF WITH AN UPDATED COPY OF THE SENTRY GOOD TIME DATA DISPLAY TO REFLECT THE GCT AWARDED FOR THE PREVIOUS YEAR.

6) THE ISM WILL ENTER THE FINAL GCT AWARD INTO SENTRY ON THE INMATE'S RELEASE DATE, PRIOR TO FINAL SATISFACTION OF THE SENTENCE. THE FINAL GCT AWARD SHOULD BE MADE ON THE INMATE'S RELEASE DATE SINCE AWARDS OF GCT ARE VESTED AND MAY NOT LATER BE DISALLOWED. (IF THE TIME REMAINING ON THE SENTENCE IS LESS THAN A YEAR, A PRORATED AMOUNT OF GOOD CONDUCT TIME WILL BE PROJECTED BY THE SENTRY GOOD CONDUCT TIME TRANSACTION. THIS ALSO INCLUDES SHORTER SENTENCES, SUCH AS I YEAR AND I DAY, WHICH DO NOT EARN THE FULL AMOUNT OF 54 DAYS GCT, BUT

EARN A LESSER PRORATED AMOUNT.)

7) ALL OR PART OF THE MAXIMUM GCT, FOR EACH YEAR OR PORTION OF A YEAR SERVED, MAY DE AWARDED OR DISALLOWED. GCT THAT IS AWARDED IS VESTED AND MY NOT LATER BE DISALLOWED. GCT THAT IS DISALLOWED MAY NOT LATER BE AWARDED, (UNLESS ORDERED RESTORED BY BP-11 APPEAL OR OTHER EQUIVALENT ACTION.) UNLIKE INMATES SENTENCED FOR OFFENSES OCCURRING PRIOR TO NOV. 1, 1997 WHO EARN GOOD TIME UNDER 18 USC 4161 AND 4162, INMATES SERVING CCCA SENTENCES AND EARNING GCT ARE NOT ELIGIBLE FOR LUMP SUM AWARDS OF GCT.

8) INMATES SENTENCED FOR OFFENSES OCCURRING PRIOR TO NOVEMBER 1, 1987 ARE NOT AFFECTED BY THIS OM AND WILL CONTINUE TO EARN GOOD TIME CREDIT UNDER TITLE 18 U.S.C., SECTIONS 4161 AND 4162.

9) COMMUNITY PROGRAMS MANAGERS WILL PERFORM THE ABOVE COMPUTATIONS FOR INMATES IN CONTRACT FACILITIES.

D. QUESTIONS CONCERNING GOOD CONDUCT TIME CREDIT MAY BE REFERRED TO THE CENTRAL OFFICE INMATE SYSTEMS BRANCH (FTS 724-3050). THIS OPERATIONS MEMORANDUM WILL REMAIN IN EFFECT UNTIL ALL APPROPRIATE PROGRAM STATEMENTS HAVE BEEN UPDATED.

OM 018-89_Mistretta V. U.S., Supreme Court Decision on Sentencing Guidelines (caps in original)

NUMBER: EMS OM 18-89 (5883)

OPERATIONS MEMORANDUM

DATE: FEBRUARY 2, 1989

SUBJECT: MISTRETTA V. U.S. SUPREME COURT DECISION ON SENTENCING GUIDELINES

CANCELLATION DATE: JANUARY 31, 1990

I PURPOSE: TO ADVISE STAFF OF SENTENCE COMPUTATION PROCEDURES TO BE FOLLOWED AS A RESULT OF THE SUPREME COURT RULING ON SENTENCING GUIDELINES.

II. BACKGROUND: ON JANUARY 18, 1989, THE SUPREME COURT RULED IN THE CASE OF MISTRETTA V. U.S., THAT THE SENTENCING GUIDELINES PROMULGATED BY THE U.S. SENTENCING COMMISSION ARE CONSTITUTIONAL. THIS DECISION HAS RAISED SEVERAL QUESTIONS CONCERNING ITS IMPACT ON INMATES SENTENCED AFTER THE GUIDELINES BECAME EFFECTIVE.

III. ACTION: THE FOLLOWING PROCEDURES WILL BE FOLLOWED FOR SENTENCES IMPOSED

FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. IT IS EMPHASIZED THAT ALL THE FOLLOWING INSTRUCTIONS APPLY ONLY TO CASES INVOLVING OFFENSES ON OR AFTER NOVEMBER 1, 1987.

A. SENTENCES IMPOSED AS GUIDELINE SENTENCES UNDER THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (CCCA).

IF A SENTENCE IS IMPOSED FOR AN OFFENSE OCCURRING ON OR AFTER NOVEMBER 1, 1987, AND THE JUDGMENT AND COMMITMENT ORDER IS SILENT AS TO THE METHOD OF COMPUTATION, THE SENTENCE WILL BE COMPUTED UNDER THE PROVISIONS OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA) (18 USC 3581), UNLESS THE COURT HAS ORDERED THAT THE SENTENCE SHOULD BE COMPUTED DIFFERENTLY. GOOD CONDUCT TIME CREDIT (GCT) WILL BE COMPUTED ON THESE SENTENCES IN ACCORDANCE WITH TITLE 18 USC, SECTION 3624 (B). THESE SENTENCES ARE NOT ELIGIBLE FOR PAROLE.

B. SENTENCES IMPOSED UNDER PRE-NOVEMBER 1, 1987 GOOD TIME AND PAROLE LAWS.

IF THE COURT IMPOSED THE SENTENCE UNDER THE PRE-NOVEMBER 1, 1987 GOOD TIME AND PAROLE LAWS, (18 USC 4161, 4162 & 4205), THE SENTENCE WILL REMAIN COMPUTED IN ACCORDANCE WITH THE ORDER, APPLYING

STATUTORY GOOD TIME AND/OR EXTRA GOOD TIME CREDIT AND PAROLE ELIGIBILITY (IF APPLICABLE), UNLESS THERE IS AN INDICATION IN THE JUDGMENT THAT THE SENTENCE NOT BE COMPUTED IN ALL RESPECTS AS A PRE-NOVEMBER 1, 1987 SENTENCE.

INMATES INQUIRING ABOUT THE LEGALITY OF THEIR SENTENCES, AND WHETHER THEY SHOULD BE RESENTENCED UNDER THE CCCA GUIDELINES, SHOULD BE ADVISED TO CONTACT THEIR COUNSEL IN THE SENTENCING DISTRICT, TO RAISE THE QUESTION WITH THE SENTENCING JUDGE. THIS PROCESS DOES NOT INVOLVE BUREAU OF PRISONS STAFF, TO CONTACT THE COURTS ON THESE ISSUES.

C. THERE ARE APPROXIMATELY 80 CASES WHERE THE GOVERNMENT APPEALED SENTENCES IMPOSED UNDER THE OLD LAWS (AS IN B ABOVE). THESE ARE THE ONLY CASES WHICH THE DEPARTMENT OF JUSTICE WILL PURSUE, UNDER MISTRETTA, TO HAVE THE SENTENCE LEGALLY CHANGED FROM THE EXISTING PRE-NOVEMBER 1, 1987 SENTENCE TO A CCCA GUIDELINE SENTENCE. HOWEVER, IT IS NOT NECESSARY FOR THE INMATE SYSTEMS MANAGER TO TAKE ANY ACTION AT THIS TIME, SINCE AN AMENDED JUDGMENT AND COMMITMENT ORDER WILL BE ISSUED IF THE GOVERNMENT IS SUCCESSFUL IN ITS LEGAL ACTION. INSTRUCTIONS FOR RECOMPUTATION OF THESE SENTENCES WILL BE ISSUED IN A SEPARATE OPERATIONS MEMORANDUM.

THE DEPARTMENT WILL BE PROVIDING THE CENTRAL OFFICE WITH A LIST OF THE CASES WHERE THE GOVERNMENT FILED AN APPEAL. UNTIL THIS INFORMATION IS RECEIVED, INMATE SYSTEMS MANAGERS SHOULD CONTINUE TO CONTACT THE ASSISTANT U.S. ATTORNEYS IN THE SENTENCING DISTRICTS WHENEVER AN INMATE IS DUE FOR RELEASE WITH A SENTENCE UNDER THE PRE-NOVEMBER 1, 1987 LAWS, TO DETERMINE IF THE GOVERNMENT FILED AN APPEAL. IF THERE IS AN APPEAL, THE AUSA SHOULD BE ASKED FOR INSTRUCTIONS AS TO THE IMPENDING RELEASE, AND WHEN A COURT RULING CAN BE EXPECTED. IF THERE IS NO APPEAL, PARAGRAPH B ABOVE APPLIES, AND THE INMATE SHOULD BE PROCESSED FOR RELEASE.

D. SENTENCES IMPOSED UNDER PRE-NOVEMBER 1, 1987 GOOD TIME AND PAROLE LAWS WITH THE PROVISION FOR A CONDITIONAL OR ALTERNATIVE GUIDELINE SENTENCE.

PROCEDURES FOR COMPUTATION OF THESE SENTENCES ARE BEING REVIEWED AT THIS TIME. THESE SENTENCES SHOULD REMAIN COMPUTED UNDER THE PRE-NOVEMBER 1, 1987 LAWS. ADDITIONAL INFORMATION WILL BE ISSUED IN A SEPARATE MESSAGE.

E. SENTENCES IMPOSED UNDER THE PRE-NOVEMBER 1, 1987 PAROLE LAWS AND POST-NOVEMBER 1, 1987 GOOD CONDUCT TIME

STATUTES.

IF THE COURT IMPOSED A SENTENCE WITH PAROLE ELIGIBILITY UNDER 18 USC 4205 AND ORDERED GOOD CONDUCT TIME UNDER 18 USC 3624, THE SENTENCE WILL REMAIN COMPUTED IN ACCORDANCE WITH THE ORDER.

F. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS. (FTS: 724-3050).

THIS OPERATIONS MEMORANDUM WILL REMAIN IN EFFECT UNTIL ALL APPROPRIATE PROGRAM STATEMENTS HAVE BEEN UPDATED.

SIGNED

/s/ Clair A. Cripe
CLAIR A. CRIPE
GENERAL COUNSEL

OM 026-89_Computation Procedures for CCCA Conditional Guideline Sentences (caps in original)

NUMBER: EMS OM 26-89 (5883)

OPERATIONS MEMORANDUM

DATE: FEBRUARY 21, 1989

SUBJECT: COMPUTATION PROCEDURES FOR CCCA CONDITIONAL GUIDELINE SENTENCES

CANCELLATION DATE: JANUARY 31, 1990

I. PURPOSE: TO IMPLEMENT PROCEDURES FOR COMPUTATION OF CONDITIONAL GUIDELINE SENTENCES, AS A RESULT OF THE SUPREME COURT DECISION IN MISTRETTA V. U.S., NO. 87-7028 (JANUARY 18, 1989).

II. BACKGROUND: THE MAJOR SENTENCING PROVISIONS OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (CCCA), BECAME EFFECTIVE ON NOVEMBER 1, 1987. ON THAT DATE, THE CCCA REPEALED VARIOUS SENTENCE PROVISIONS (INCLUDING PAROLE ELIGIBILITY, STATUTORY AND EXTRA GOOD TIME CREDIT). ALSO, ON NOVEMBER 1, 1987, NEW SENTENCE PROCEDURES, (WITHOUT PAROLE ELIGIBILITY, STATUTORY OR EXTRA

GOOD TIME CREDIT) WENT INTO EFFECT FOR OFFENSES RULED THAT THE CCCA SENTENCING GUIDELINES WERE UNCONSTITUTIONAL AND CONTINUED TO IMPOSE SENTENCES (FOR POST-NOVEMBER 1, 1987 OFFENSES) UNDER PRIOR LAWS. IN MANY CASES, THE COURTS IMPOSED AN ADDITIONAL GUIDELINES SENTENCE, TO TAKE EFFECT IN THE EVENT THE SUPREME COURT UPHELD THE CONSTITUTIONALITY OF THE SENTENCING GUIDELINES.

ON JANUARY 18, 19889, THE SUPREME COURT UPHELD THE CONSTITUTIONALITY OF THE SENTENCING REFORM ACT OF 1984 (WHICH IS INCLUDED IN CHAPTER II OF THE CCCA), AND RULED THAT THE SENTENCING GUIDELINES PROMULGATED BY THE U.S. SENTENCING COMMISSION ARE CONSTITUTIONAL.

(THE FOLLOWING IS AN EXAMPLE OF A JUDGMENT AND COMMITMENT ORDER WHERE THE COURT IMPOSED A SENTENCE UNDER PRE-NOVEMBER 1, 1987 GOOD TIME AND PAROLE LAWS, AND ORDERED A CONDITIONAL GUIDELINE SENTENCE.)

". . . IT IS THE JUDGMENT OF THE COURT THAT, HAVING FOUND THE SENTENCING GUIDELINES UNCONSTITUTIONAL, THE FOLLOWING SENTENCE IS IMPOSED . . . THE DEFENDANT IS COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL . . . FOR A PERIOD OF SIX YEARS . . .

. . . IF HOWEVER, AT A LATER DATE, THE SUPREME COURT DECLARES THE SENTENCING GUIDELINES TO BE CONSTITUTIONAL, THEN, IN LIEU OF THE ABOVE SENTENCE, THE DEFENDANT IS COMMITTED FOR A PERIOD OF FORTY-EIGHT MONTHS, PLUS A PERIOD OF THREE YEARS SUPERVISED RELEASE . . ."

(IN THE ABOVE EXAMPLE, THE NEW CCCA GUIDELINE SENTENCE IS FORTY-EIGHT MONTHS, PLUS A PERIOD OF THREE YEARS SUPERVISED RELEASE.)

III. ACTION: WHEN THE JUDGMENT AND COMMITMENT ORDER IS CLEAR THAT THE COURT ORDERED A CONDITIONAL GUIDELINE SENTENCE (TO BECOME EFFECTIVE IF THE SUPREME COURT UPHELD THE SENTENCING GUIDELINES), THE CCCA GUIDELINE SENTENCE WILL BE COMPUTED IN THE FOLLOWING MANNER.

1) THE GUIDELINE SENTENCE WILL BE COMPUTED AS BEGINNING ON JANUARY 18, 1989, (THE DATE THE SUPREME COURT DECIDED IN MISTRETTA THAT THE SENTENCING GUIDELINES ARE CONSTITUTIONAL).

2) ALL PRIOR TIME SPENT IN CUSTODY FOR THE OFFENSE WILL BE COMPUTED AS JAIL TIME CREDIT. (THIS INCLUDES TIME SERVED ON THE PRIOR REGULAR ADULT SENTENCE THROUGH JANUARY 17, 1989 AND ANY PRIOR JAIL TIME CREDIT.)

3) ADJUST THE FULL TERM DATE OF THE GUIDELINE SENTENCE FOR ALL JAIL TIME CREDIT (AS INDICATED ABOVE).

4) STATUTORY GOOD TIME (SGT) AND EXTRA GOOD TIME (EGT) EARNED ON THE PRIOR REGULAR ADULT SENTENCE WILL CARRY OVER AND BE APPLIED TO THE NEW GUIDELINE SENTENCE. SUBTRACT THE TOTAL EARNED SGT (FOR ALL THE TIME SERVED THROUGH JANUARY 17, 1989) AND EGT (IF APPLICABLE) AS A LUMP SUM AMOUNT FROM THE ADJUSTED FULL TERM DATE, (ADJUSTED FOR JAIL TIME CREDIT UNDER 2 AND 3 ABOVE) TO DETERMINE THE TENATIVE PROJECTED RELEASE DATE.

5) GOOD CONDUCT TIME (GCT) MAY BE EARNED ON THE GUIDELINE SENTENCE FOR TIME SERVED FROM JANUARY 18, 1989, IF THE TOTAL SENTENCE IS 1 YEAR AND 1 DAY OR MORE. GOOD CONDUCT TIME AWARDS WILL BE USED TO FURTHER REDUCE THE TENTATIVE PROJECTED RELEASE DATE. GOOD CONDUCT TIME (THE 54 DAY RATE FOR EACH YEAR SERVED) WILL NOT BE AWARDED FOR TIME IN CUSTODY ON THE PREVIOUS REGULAR ADULT SENTENCE, PRIOR TO JANUARY 18, 1989.

6) COMPUTE THE PROJECTED GOOD CONDUCT TIME, FOR THE TIME REMAINING TO BE SERVED FROM JANUARY 18, 1989, THROUGH THE TENTATIVE PROJECTED RELEASE DATE. SUBTRACT THE TOTAL GCT (FOR EACH FULL YEAR REMAINING TO BE SERVED PLUS THE

PARTIAL LAST YEAR OF THE SENTENCE), TO ESTABLISH THE FINAL PROJECTED RELEASE DATE.

7) THE GOOD TIME ACTION DATE, (THE DATE WHEN CONSIDERATION BEGINS FOR AWARDING GOOD CONDUCT TIME FOR EACH FULL YEAR IN CUSTODY), WILL BE COMPUTED FROM JANUARY 18, 1989. JAIL TIME WILL NOT BE USED TO ADJUST THE GOOD TIME ACTION DATES FOR THESE SENTENCES, SINCE SGT AND/OR EGT IS APPLIED TO THE JAIL TIME CUSTODY. ON THESE SENTENCES, JAIL TIME CREDIT IS APPLIED ONLY TO THE FULL TERM DATE, TO GIVE AN ADJUSTED FULL TERM DATE.

8) IN ADDITION TO THE DETERMINATION OF GOOD CONDUCT TIME CREDIT AFTER THE END OF EACH YEAR OF THE SENTENCE, PREVIOUSLY EARNED STATUTORY GOOD TIME, WHICH HAS BEEN APPLIED TO THE GUIDELINE SENTENCE, MAY BE CONSIDERED FOR FORFEITURE OR WITHHOLDING DUE TO DISCIPLINARY INFRACTIONS.

9) THE ABOVE PROCEDURES APPLY ONLY TO CONDITIONAL GUIDELINE SENTENCES AS DEFINED IN THIS OPERATIONS MEMORANDUM, AND DO NOT APPLY TO OTHER CCCA GUIDELINE SENTENCES. CONDITIONAL GUIDELINE SENTENCES WILL NOT BE AGGREGATED WITH OTHER CCCA GUIDELINE SENTENCES.

10) A NEW SENTENCE PROCEDURE CODE FOR

COMPUTATION OF THESE SENTENCES WILL BE ISSUED IN A SEPARATE MESSAGE.

QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050). THIS OPERATIONS MEMORANDUM WILL REMAIN IN EFFECT UNTIL ALL APPROPRIATE PROGRAM STATEMENTS ARE UPDATED.

/s/ Clair A. Cripe
CLAIR A. CRIPE
GENERAL COUNSEL

UNITED STATES SENTENCING COMMISSION

SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS

June 18, 1987

CHAPTER FOUR - ANALYSIS OF AND COMPARISON WITH CURRENT PRACTICE

Both the directive to prepare a prison impact statement and the manner in which the Commission drafted the guidelines necessitated collection and analysis of a large volume of data relating to recent sentencing practices. Thee efforts and their results are described below.

A. The Data

The Administrative Office of the U.S. Courts provided a computer file of all defendant records in its Federal Probation Sentencing and Supervision Information System (FPSSIS). Hence, the Commission had access to data regarding all felony and serious misdemeanor cases leading to convictions since mid-1983. This basic information included a description of the offense, a characterization of the defendant's background and criminal record, the method of disposition of the case, and the sentence imposed. The data excluded all petty offense cases handled exclusively by magistrates.

FPSSIS, which formed the core of the

Commission's current practices data, was incomplete in two ways. First, it omitted several items of information that are relevant to the sentencing decision, both currently and under the guidelines. Second, it lacked estimates of the time actually served by convicted defendants, as opposed to the sentence pronounced by the judge.

To overcome the first problem, the Commission collected a case sample of 11,000 defendants who were convicted in fiscal 1985 (October 1, 1984 through September 30, 1985), developed a data collection form to augment the FPSSIS data, and requested the Probation Division of the Administrative Office to complete the form for the 11,000 cases.

The Probation Division's response was overwhelming. It provided the Commission with 10,500 responses, complete with the corresponding presentence investigation reports. As a result, the Commission has had ready access to quantitative and qualitative information in the form of 10,500 computer records and even more detailed information in the form of 10,500 presentence investigation reports.

To overcome the second problem, the Commission asked the Bureau of Prisons to specify for each of the 10,500 cases one of the following: the length of time the defendant served in prison, the length of time he was scheduled to serve in prison if a parole date had been set, or the length of time he was expected to remain in prison according to rules that the Bureau routinely employs to estimate release dates. The Bureau's careful response to a difficult problem provided the

Commission with accurate estimates of time currently served by convicted defendants. When the Bureau could not provide estimates, the Commission relied on computerized Parole Commission records, and when these were unavailable, estimates of time served were based on prevailing release practices.

The FPSSIS file, augmented as described above, satisfied most of the Commission's needs for current sentencing practices data. The FPSSIS data were too recent to provide adequate information about current probation and parole supervision practices. In addition, FPSSIS did not provide adequate information about time served following a parole revocation. The Commission relied on two sources for this information. The first was extant tabulations and statistical analysis of supervision histories. The second was a sample of reports of revocation hearings conducted by the Parole Commission since 1977.

B. Supporting Analysis and Results

The Commission posed several related questions. How much time on average is served currently by convicted federal defendants? How does this average vary with characteristics of the offense, the background and criminal history of the defendant, and the method of disposition? How much of the variation about these averages cannot be attributed to the crime and the defendant; that is, how disparate is sentencing? What is the rate at which defendants are returned to prison following a parole revocation? How long do defendants remain in prison following a revocation?

The information derived provided a numerical anchor for guideline development. Along with other information at the Commission's disposal, the analysis of current practices[62] suggested factors for consideration as guideline ingredients. It also made it possible to test the significance of other factors proposed for inclusion in the guidelines.

1. Analysis and Interpretation

Given the structure adopted, the most important question for guideline development was: "What sentence is typical for defendants who are first-time offenders and are convicted at trial?"[63] Few such defendants exist among the 40,000 defendants convicted during 1985. Consequently, when answering this question, the Commission relied on standard statistical techniques (multivariate maximum likelihood estimation) to infer how such defendants typically would be treated given prevailing sentencing and parole practices.

Given the disagreement that exists among judges about the "rules of sentencing," no statistical model could replicate judicial decision making, nor was doing

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[62]As used throughout, "current practice" refers to sentencing practices during fiscal 1985, as analyzed by the commission staff.

[63]Estimates of sentences for first-time offenders convicted at trial were used because the guidelines and policy statements contain independent provisions for dealing with criminal history and guilty pleas.

so an object of the analysis.[64] However, the statistical analysis provided the Commission with a meaningful synopsis of current sentencing practices, revealing both

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[64]The results are empirically-based estimates. The estimates do not provide a precise picture of current judicial decisions. For one, the Parole Commission, the Bureau of Prisons, and the Judiciary interact to determine how long convicted offenders remain in prison. At best, then, the analysis reveals an amalgam of decision making processes. For another, sentencing philosophies differ among judges. Thus, for example, one judge might be more lenient with drug users whom he considers to have diminished capacity, while a second judge might impose stiff terms on the same offenders to prevent their early recidivism, and a third judge might be unconcerned about drug use. Given these differences, the statistical analysis reveals a composite picture of judicial decisions; it does not represent the decision criteria of any one judge. In addition, sentencing dispositions sometimes may not be attributable to observable traits of the offense or the offender. For these three reasons, the statistical analysis cannot and does not provide a perfect synopsis of judicial decision making.

Although the analysis misses some aspects of judicial decision making, it nevertheless identifies major factors that most judges treat as important for sentencing. Although the Judiciary, the Parole Commission and the Bureau of Prisons interact to set release dates, the Judiciary dominates. The judge has exclusive authority to determine whether a defendant will be sentenced to a term of imprisonment, and within the limits allowed by law, to set the maximum and minimum terms. Furthermore, because maximum good-time is fixed by law and awarded routinely, and because the Parole Commission generally follows parole guidelines, the judge can fashion sentences to conform to his intent. While judges disagree about some relevant sentencing factors, they agree generally about principal factors; *e.g.*, injury to a victim, use of a weapon, property loss from the offense, role in the offense, etc. For these factors, the statistical analysis provides estimates of each factor's relative importance for sentencing.

practices that have strong acceptance and those that have weaker support. This analysis provided valuable material for policy deliberations.

2. Presentation of Results – The Levels Table

Standard multivariate statistics were used to draw inferences about the sentences received by first-time defendants convicted at trial. For the Commission's purposes, the results were summarized and presented in a form known as the "Levels Table," which appears as Tables 1(a) and 1(b), *infra*.[65] Table 1(a) is entitled "Estimated Time Served for Baseline Offenses: 1st Time Offenders, Sentenced to Prison, Adjusted for Good Time." Table 1(b) is entitled "Estimated Level Adjustments."

To properly interpret these tables, it is necessary to have a precise understanding of the terms utilized in the tables, which are explained below:

"Baseline offense." Table 1(a) reports sentence levels associated with certain "baseline offenses" prior to adding (or subtracting) levels for aggravating (or mitigating) factors. For example, the generic category "first degree homicide" is a baseline offense. As another example, a "single event robbery between $500 and $3,000" is a baseline offense. The classification of baseline offenses identifies offense elements that the analysis showed to be especially salient. However, the

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[65]These tables are included here because they present a large volume of information in a concise form. Many other data sources were also utilized. *See* Part C, *infra*.

classifications are not the only logical ones that could be devised. They do not correspond exactly to the classifications in Chapter Two of the guidelines.

"Sentence level." The guidelines use the term "offense level" to refer to permissible sentencing ranges. For example, when the guidelines assign level 14 to an offense, a first-time offender may be sentenced to 15 to 21 months in prison. As used in Table 1(a), the "sentence level" is the offense level that is closest to the average time currently served by first-time offenders who are sentenced to a term of imprisonment. Thus, a sentence level of 14 means that the average time served is approximately 18 months, before adjustment for good time (as defined below).

"Adjusted for good time." Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines. This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).

"First-time offender." A first-time offender is one who had no prior federal or state-court conviction. Convictions for most petty crimes, some juvenile adjudications, and outdated convictions do not count against an offender. The entries in the Levels Table pertain directly only to first-time offenders, thus conforming in structure to Chapter Two of the guidelines.

"Convicted at trial." The Levels Table assumes that the offender was convicted at trial of the offense that he in fact committed, as determined from the presentence report. This is not necessarily the offense of which he was convicted. Thus, the Levels Table reports the average punishment for which the offender is "at risk" prior to any negotiations that might result in a guilty plea. Such negotiations, which are routine in the federal system, typically result in less prison time being served than is reported in the Levels Table.

"Sentenced to prison" and "estimated % sentenced to prison." Table 1(a) reports the sentence level associated with a crime, given that the defendant is a first-time offender who was convicted at trial and a prison sentence was imposed. For example, conviction for an unsophisticated embezzlement of less than $1,500 results in a level 8 prison term (an average of about 5 months or a range of 2-8 months) if a prison term is imposed. However, a prison term is currently imposed in only about 24 percent of such cases. Because of this, the average time served by all first-time embezzlers convicted at trial of stealing $1,500 is actually about 1 month (rather than 2-8 months). The estimated percentage of first-time offenders, convicted at trial, who receive prison terms is reported in the last column of Table 1(a).

"Level adjustments." Table 1(b) reports adjustments, in levels, to the sentence levels in Table 1(a), corresponding to aggravating and/or mitigating factors associated with each baseline offense. For example, the use of a weapon during a robbery results in an increase in the average sentence. Being a

peripheral participant decreases the average sentence for fraud cases.

As an illustration of the use of the Levels Table, consider bank robbery. Table 1(a) indicates that a first-time offender who is convicted at trial of stealing $5,000 from a federally-insured bank can expect to receive a sentence at approximately level 21 (roughly 37 to 46 months) if sentenced to prison. Table 1(b) indicates that, if he was armed, he can expect the sentence to be higher, on average, by 3 to 4 levels, (about 22 additional months). Had he entered a guilty plea, the sentence probably would have been about 3 to 4 levels lower. Because almost all bank robbers are sentenced to prison, the conditional average, i.e., the average time served if sentenced to a term of imprisonment, closely approximates the average time served by convicted bank robbers.

As a second illustration, consider embezzlement from a bank. Table 1(a) indicates that a first-time offender who is convicted at trial of embezzling $5,000 from a federally insured bank can expect to receive a sentence at about level 9 (4 to 10 months) if sentenced to prison. However, embezzlers who steal this amount receive prison terms in only about 33 percent of the instances. Consequently, the average prison term, considering all first-time embezzlers who are convicted at trial, is closer to 2 to 3 months.

C. Other Sources

The Sentencing Commission used Tables 1(a) and 1(b) during its final deliberations. Earlier results of

similar analyses presented in other forms, were used in drafting some of the guidelines. Presentence investigation reports were reviewed when the picture from the statistical analysis was unclear. Another useful source was a table provided by the U.S. Parole Commission that reports the average prison time that federal offenders who are sentenced to a term of imprisonment are expected to serve based on the release dates set at their initial parole hearing. A copy of this document appears as Appendix B to this volume. Yet another source was the Parole Guidelines themselves.[66]

D. Comparing Sentences under the Sentencing Guidelines with the Parole Guidelines

Tables 1(a) and 1(b) provide information that

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[66]Sources from the Parole Commission have limitations. First, to be eligible for parole, an offender has to receive a prison term in excess of 12 months. Only about 30 percent of all offenders who are convicted of serious crimes in federal district courts qualify. Second, parole practices data roughly distinguish first-time offenders from others, but do not distinguish trial convictions from guilty pleas. Although the Parole Commission ignores the method of disposition when setting release dates, sentencing practices still result in differences in time served for defendants convicted by trial and by guilty plea. Third, tentative release dates change over time in response to the offender's institutional adjustments. While these changes tend to be minor on average, they affect time served statistics. Fourth, offenders who receive lengthy prison terms generally waive their rights to have a parole hearing within 90-120 days, so for long sentences, the Parole Commission statistics are based on the sentences of offenders convicted prior to 1985. For most serious federal crimes, these limitations are minor.

permits a comparison between current sentences and sentences under the guidelines. See Part B.2, *supra*. In addition, Appendix B provides average time served and other information about sentence length for those offenders who are sentenced to a term of imprisonment.

The Commission has received inquiries regarding how sentences under the guidelines compare to those provided for in the parole guidelines. In response to these inquiries, a comparison of the offense levels specified in the two guidelines systems is published as Appendix C to this volume. Similar information, although not in precisely the same form, was available to and used by the Commission.

Appendix C lists offenses by applicable sentencing guideline, including a maximum of two specific offense (aggravating/mitigating) characteristics. The corresponding offense level under the sentencing guidelines, and the levels closest to the applicable range under the parole guidelines, are also listed. The distinctions and definitions in the sentencing guidelines often do not coincide precisely with those in the parole guidelines. The accompanying notes provide further detail in the most significant cases.

Comparisons must be made with considerable caution. Not only do the distinctions differ at times, but the parole guidelines and the sentencing guidelines perform substantially different functions. The sentencing guidelines constrain the initial sentencing decision, thus limiting the lower as well as the upper limits of the sentencing range. The parole guidelines,

on the other hand, serve primarily to limit high-end disparity among those defendants who are sentenced to prison; they do not in any way constrain judicial decisions to sentence below them. In addition, the sentencing guidelines are constructed on an after-trial basis, while the parole guidelines do not distinguish defendants who are convicted at trial from those who plead guilty. Furthermore, the parole guidelines are based upon "real offense" conduct (as determined by the parole hearing examiner), whereas the sentencing guidelines primarily depend upon the offense of conviction and the presence or absence of relevant factors as defined by the guidelines.

Because the parole guidelines are limiting, average time served is generally lower than the parole guideline range, especially for property offenses (most notably, embezzlement). However, if a sentence that greatly exceeds the parole guidelines is imposed, the defendant may be required to serve longer than the guidelines, because the sentencing judge can require that the defendant serve at least one-third of the sentence imposed. Average time served can therefore exceed the parole guidelines. This is the case, for example, with armed bank robbery.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 06-762 MO
ISMAEL TABLADA, PETITIONER

v.

CHARLES DANIELS, WARDEN, FCI SHERIDAN,
FEDERAL BUREAU OF PRISON, RESPONDENT

DECLARATION OF HARLAN W. PENN

I, Harlan W. Penn, hereby declare and state as follows:

1. I am currently employed by the Federal Bureau of Prisons (Bureau, BOP) as the Western Regional Counsel of the BOP. I have held this position from December 1993 to present. I began my legal career in 1977 when I received my Juris Doctor at the University of Missouri, Columbia. I was admitted to practice in the State of Missouri in 1977 (Bar Number 26587) and in the District of Columbia in 1983 (Bar Number 370713). I served two years as a Judicial Law Clerk for the Honorable Floyd Gibson, Chief Judge, Eighth Circuit Court of Appeals. I was next an attorney for three years with the Securities and Exchange Commission in Washington, D.C. I was then briefly in private practice before joining the Bureau as an Attorney/Advisor in January 1985. I subsequently held the positions of Assistant General Counsel, Associate General Counsel, and Deputy General Counsel for the Bureau before becoming the Western Regional Counsel in 1993.

2. As Western Regional Counsel, I have general oversight responsibilities for legal matters for Bureau institutions in the Western Region. However, in the above captioned case, I have been asked to provide a declaration in support of the Office of the U.S. Attorney for the District of Oregon. The substance of this declaration includes Attorney/Client, Attorney Work Product, and Deliberative Process privileged material regarding discussions between the Office of General Counsel and the Bureau while I was employed in the Office of General Counsel prior to 1993. I have been authorized by the Director of the Bureau to make this disclosure.

3. When I began my employment with the Bureau, one of my duties was to assist the client in implementation of the Sentencing Reform Act of 1984 (SRA). One of the many issues involved with this sentence reform legislation was the calculation of inmate Good Conduct Time (GCT).

4. While I was awaiting my background clearance, I attended a meeting of the Bureau's Regional Counsel and General Counsel's staff in December 1984 or January 1985. The meeting was attended by General Counsel Claire Cripe; Associate General Counsel Ira Kirschbaum; Regional Counsels John Shaw, Chris Erlewine, Charles Faulkner, Wallace Cheney and David Essig; and Chief of Inmate Systems Management Don Anderson. To the best of my knowledge, these individuals have all retired from the Bureau. The issue of how to compute inmate GCT was discussed in light of the statutory changes made by the SRA.

5. After the discussions at this meeting and legal review of all provisions of the SRA, the Bureau decided to implement the GCT policy on the amount of time an inmate had served, not upon the sentence imposed. I participated in other meetings and events where this decision was explained and legal and technical staff were trained on the proper computation of GCT. This method of computing GCT was consistent with the Bureau's understanding of the SRA and with the correctional goals of effectively using GCT as a tool to reward good behavior and providing inmates knowledge of when they could expect to be released from prison. Among the reasons the sentence imposed methodology was considered but deemed impractical was that it would have been inconsistent with vesting of the award of GCT in annual increments of 54 days based on good conduct for one year. While the time served methodology was different from BOP's experience with the good time provisions of 18 U.S.C. § 4161 (repealed) it was viewed as similar to the operation of Industrial Good Time under 18 U.S.C. § 4162 (repealed). Under that latter provision an amount of good time was awarded for each month that an inmate was performing certain duties or was housed in a prison camp without regard to the length of the sentence.

6. Once the U.S. Sentencing Commission (Commission) was officially constituted, I was assigned legal liaison duties with staff of the Commission. In that connection I recall speaking with then General Counsel John Steer (now a Sentencing Commissioner) regarding the issue of implementation and calculation of inmate GCT under the SRA. I recall that discussion

included the differences between computing GCT based on the portion of the sentence actually served and computing it on the basis of the sentence imposed, and informing Mr. Steer of the Bureau's decision on this issue.

7. Pursuant to title 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19 day of March, 2007.

/s/ HARLAN W. PENN
HARLAN W. PENN
Western Regional Counsel
Federal Bureau of Prisons
Dublin, California

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 06-762 MO
ISMAEL TABLADA, PETITIONER

v.

CHARLES DANIELS, WARDEN, FCI SHERIDAN,
FEDERAL BUREAU OF PRISON, RESPONDENT

MOTION TO STRIKE RESPONDENT'S AMENDED SUR-REPLY AND SUPPORTING DECLARATION

The petitioner, through his attorney, Stephen R. Sady, respectfully moves to strike the amended sur-reply and supporting declaration filed on March 19, 2007, on the grounds that they are both untimely and fall outside the range of reasonableness. While the petitioner agrees that in general discretion should be generously applied, the particular positions adopted by the BOP in these documents should result in their being stricken.

First, the BOP for the first time in eight years of litigation makes the unsupported claim that "the BOP's interpretation of this statute was immediately litigated and later upheld in *Mistretta v. United States*, 488 U.S. 361 (1989)" (Amended Sur-Reply at 4; *see also* Amended Sur-Reply at 1-2). This claim goes beyond what can fairly be argued about *Mistretta*: Justice Blackman stated that the certiorari had been granted

"in order to consider the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission." 488 U.S. at 650.[1] Rather than upholding the BOP's interpretation of the good time statute, the Supreme Court approved the delegation of implementation of the Sentencing Reform Act to the United States Sentencing Commission. The mischaracterization of the state of the law alone warrants striking the pleading.[2]

Second, the BOP makes a factually untenable statement by claiming that the BOP "provides up to 14 percent of GCT credits, or at most seven days less than the 'sentence imposed' methodology." Amended Sur-Reply at 3. This simply misrepresents the mathematics: 54 divided by 365 equals .14794520, or approximately 15 percent. On the other hand, the BOP methodology allows for a maximum of 47 days for a one year sentence, or 47 divided by 365 which equals .12876712, or 12.87 percent, which rounds to almost 2.2 percent below 15 percent. The BOP's misleading math further supports striking the pleading.

Third, the amended sur-reply and supporting declaration should be stricken as an untimely effort to

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[1]In particular, the Court considered whether Congress granted the Commission excessive legislative power in violation of the non-delegation doctrine and the principles of separation of powers.

[2]The BOP also misstates the law by asserting that there is an exhaustion prerequisite to an APA claim, an argument considered and rejected in *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) (Amended Sur-Reply at 5).

obfuscate and to expand the factual record. In its opening memorandum of law, the petitioner fully stated the issues requiring a response to the allegation that the BOP either exercised no discretion in adopting the time-served method for calculating good time credits or exercised its discretion unreasonably. In response, the BOP never abandoned the position taken in prior litigation that the agency believed the statute unambiguously required it to implement the time-served methodology.

For the first time in sur-rebuttal, the BOP, without disclaiming that the statute is unambiguous, suggests that the agency consciously rejected the Sentencing Commission's sentence-imposed methodology. Further, the BOP now provides an attorney declaration that purports to clarify the factual record, but, in fact, adds nothing to that record. The declaration suggests both that the agency adopted the "time served" methodology because the statute required it and that the agency consciously rejected the Sentencing Commission's "sentence imposed" methodology as an exercise of discretion. The declaration should be stricken because the BOP cannot have it both ways.

The BOP's last-minute declaration by BOP counsel is irrelevant given that claims under 5 U.S.C. § 706(2)(A) are decided solely on the administrative record. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49-50 (1983). In *State Farm*, the Court held that "it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" and not on attorneys' representations. 463 U.S. at 49-50; *see also*

Altamirano v. Gonzales, 427 F.3d 586, 595 (9th Cir. 2005) (courts "may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The declaration by BOP counsel is immaterial to the APA question, which is limited to the administrative record. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) (lower court should not have relied on "post hoc" litigation affidavits in reviewing agency action); *see also Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made . . . not some new record completed initially in the reviewing court.").

If the Court permits the BOP to add to the otherwise silent administrative record, the agency should be required to state clearly its legal position and to present its evidence at a hearing where, with discovery and cross-examination, the Court can make the relevant factual determinations. The BOP should not be permitted to supplement the factual record with controverted facts. Either the BOP regarded the statute as unambiguous, in which case no discretion was exercised, or the agency regarded the statute as

ambiguous and, with no notice and opportunity to comment, and utterly irrationally, implemented the statute inconsistently with the Sentencing Commission's methodology. In any event, Mr. Tablada is entitled to relief.

For the foregoing reasons, we respectfully request that the Court strike the amended sur-reply and declaration and either set the matter for an evidentiary hearing or grant the petition on the current record.

RESPECTFULLY SUBMITTED this March 21, 2007.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Petitioner

ON THE BRIEF:

Nell Brown
Assistant Federal Public Defender

Lynn Deffebach
Research and Writing Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 06-762 MO
ISMAEL TABLADA, PETITIONER

v.

CHARLES DANIELS, WARDEN, FCI SHERIDAN, FEDERAL BUREAU OF PRISON, RESPONDENT

Telephone Status Conference
Transcript of Proceedings
Before the Honorable Michael W. Mosman
United States District Court Judge

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(PROCEEDINGS)

THE CLERK: Mr. Sady.

MR. SADY: Steve Sady.

THE CLERK: Yes.

Mr. Asphaug.

MR. ASPHAUG: Good morning. Scott Asphaug.

THE CLERK: Good morning.

This is the time and place set for a telephone status conference in Case No. 06-762-MO, Ismael Tablada v. Charles Daniels. We do have a court reporter recording these proceedings, so we ask that you identify yourself each time you speak.

And counsel, could you please identify yourself for the record.

MR. ASPHAUG: Scott Asphaug, Assistant United States Attorney, representing Charles Daniels for FCI Sheridan.

MR. SADY: Steve Sady and Lynn Deffebach from the Federal Public Defender's Office, on behalf of Mr. Tablada.

THE CLERK: Could I get the spelling on the other counsel's name, please.

MR. SADY: D-e-f-f-e-b-a-c-h.

THE CLERK: Thank you.

THE COURT: Counsel, good morning.

MR. SADY: Good morning.

MR. ASPHAUG: Good morning, Your Honor.

THE COURT: We're proceeding essentially based on a letter I received from Mr. Sady, suggesting that a status conference like this would be appropriate in this case.

I'm aware that the Bureau of Prisons has expressed a willingness to flesh out the record in some manner, either through interrogatories or otherwise, and I assume that means that we're here to set up some kind of schedule for that and then proceed.

But I'll turn to you, Mr. Sady, first.

MR. SADY: Thank you, Your Honor. This is Steve Sady.

I did want to clarify the status of the record at this time. As I understood it, at the time we filed our reply, that the record before the Court, there was -- the administrative record was limited to the documents that had been filed with the respondent's opposition, and that based on those, we were arguing that under 706, no discretion had been exercised because the statute was considered unambiguous at that time, and

that it was irrational, in light of it being inconsistent with the construction given to it by the sentencing commission. As I understood it, at that point there were no facts that were in dispute.

I've reviewed again the declaration of Harlan Penn, which I take it is the document that the Court is referring to in questioning whether there is further factual development that is needed, and that's exactly where my question lies also, which is, I can read that as saying nothing more than the exact same status as we are in, as I've previously described when we filed our reply brief, in which case the expenditure of resources on further factual developments would be superfluous, or if the Court is viewing that document as raising questions of fact, and if so, that is correct, we should be engaged in a further round of what I hope would be expedited discovery and probably a hearing for the Court to determine facts, if there are facts in dispute.

I was having trouble seeing exactly what facts how the facts were being disputed from the document that has been filed, and that's why I asked for this hearing.

THE COURT: I don't view that as raising factual disputes or requiring expansion of the record. I'll turn to Mr. Asphaug in a moment, but I want to be clear, Mr. Sady. From what I hear, that's your preferred position as well, is it not, that the record is closed, that it's briefed and ready for decision without further factual development?

MR. SADY: Yes. If I am correct in understanding

the state of the facts, which is that -- and I think it's consistent with my reading of Mr. Penn's declaration, is that as they have taken the position in the litigation throughout, at the time when they put this into effect, they did not think there was discretion, they did not think it was an ambiguous statute, and so they were implementing what they thought was implementing it under the SRA, the sentencing Reform Act, as nothing more than this is what we have to do, so no discretion was exercised.

The second factual question would be, in implementing it, did they do that in a manner that was inconsistent with the way the sentencing commission designed the sentencing table. I don't see that as being -- fact being disputed either, that the sentencing commission in fact designed the sentencing table based on an 85 percent formula, and the Bureau of Prisons chose to use a different formula that provided 2 percent less credit.

If that's the state of the record, yes, we are prepared to go forward and have the Court's decision on it.

THE COURT: Mr. Asphaug?

MR. ASPHAUG: Your Honor, I think the record is as it is. I don't believe there's any additional need to expand the record at this time. We've fully briefed it with the documents that are available, and they contain Mr. Penn's declaration.

THE COURT: Very well. I agree. We'll proceed as

briefed.

Thank you. Good day.

MR. SADY: Your Honor?

THE COURT: Yes, sir.

MR. SADY: If the Court wants oral argument, I'll be glad to do that also. If the Court is prepared to rule without it, that's fine. It's only if it would be helpful to the Court.

THE COURT: All right. Thank you.

MR. ASPHAUG: Thank you, Your Honor.

(Proceedings concluded.)

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature is not certified.

/s/ BONITA J. SHUMWAY 5/10/07

BONITA J. SHUMWAY, CSR, RMR, CRR DATE
Official Court Reporter

PETITIONER'S BRIEF

151

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No. 09-5201

Supreme Court, U.S.
FILED
JAN 14 2010
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In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,

v.

J. E. THOMAS, Warden, FCI Sheridan,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

The federal good time credit statute provides for credit "of up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. The Bureau of Prisons (BOP) interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credit. The first question presented is:

> Does "term of imprisonment" in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits based on the sentence imposed?

Most lower courts rejected the BOP's claim that the statute was unambiguous, but deferred to the BOP interpretation under *Chevron*, finding the phrase "term of imprisonment" to be ambiguous. In the present litigation, the BOP conceded that the regulation implementing the good time credit statute was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule, applying *Skidmore* deference. The second question presented is:

> If "term of imprisonment" in the federal good time credit statute is ambiguous, do the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

PARTIES TO THE PROCEEDING

The petitioners, Michael Barber and Tahir Jihad-Black, are federal prisoners serving their sentences in the custody of the Attorney General and are subject to the provisions of 18 U.S.C. § 3624(b) for obtaining good time credits against the sentences imposed on them.

The respondent, J.E. Thomas, who is named in his official capacity, is the warden of the Federal Correctional Institution at Sheridan, Oregon, where the petitioners were serving their sentences at the time their petitions were filed. Mr. Jihad-Black has since been transferred to the Federal Medical Center at Devens, Massachusetts. The warden of FMC Devens is Carolyn Ann Sabol.

Table of Contents

Page

Questions Presented i

Parties to the Proceeding ii

Table of Authorities viii

Opinions Below 1

Jurisdiction 2

Relevant Provisions of Law 2

Statement of the Case 4

The Sentencing Reform Act And The Good Time Credit Statute 4

Bureau Of Prisons Implementation Of The Good Time Credit Statute 8

- The Public Administrative Record 8
- The Implementation Of The Statute 10
- The Discovery In This Case On The Administrative Record 12

Good Time Credit Litigation 13

Summary of the Argument 17

Argument 21

I. "Term Of Imprisonment" Unambiguously Means The Sentence Imposed Based On The Statute's Language, The Rule Of Intra-Statutory Consistency, And The History Of The Statute 21

A. "Term Of Imprisonment" Means The Sentence Imposed Because The Judge, Following Statutory And Guidelines Terminology, Sentenced Each Petitioner To "Imprisonment" For A "Term Of" Months . . 22

B. "Term Of Imprisonment" Means The Sentence Imposed Under The Rule Of Intra-Statutory Consistency 23

1. Because "Term Of Imprisonment" Unambiguously Means The Sentence Imposed At Least Twice In § 3624(b), "Term Of Imprisonment" Unambiguously Means The Sentence Imposed In Its Other Uses In § 3624(b) 24

2. Throughout The Sentencing Reform Act, "Term Of Imprisonment" Is Synonymous With The Sentence Imposed 25

C. The History Of The Federal Good Time Credit Statute Demonstrates Congressional Intent That Good Time Credits Be

Calculated Against The Sentence Imposed To Require In-Custody Service Of At Least 85 Percent Of The Sentence 29

1. The History Of Federal Good Time Credit Statutes Demonstrates That Credit Is Measured Against The Sentence Imposed 29

2. By Using The 85 Percent Rule, Congress Furthered Its Purpose Of Simplification 31

3. Members Of Congress Repeatedly Referred To The 85 Percent Rule In A Manner That Demonstrated The Phrase "Term Of Imprisonment" Only Meant The Sentence Imposed 33

II. If Uncertainty Remains After Considering The Language, Context, And History Of The Statute, The Rule Of Lenity Requires That "Term Of Imprisonment" Be Construed To Mean The Sentence Imposed, Whether At The First Or Second Step Of *Chevron* Analysis . . 37

A. The Federal Good Time Statute Is A Penal Statute Because Its Interpretation Determines The Actual Amount Of Incarceration A Defendant Serves . . . 37

B. The Rule Of Lenity Applies At The First Step Of *Chevron* Analysis, Resolving

Any Residual Ambiguity For *Chevron* Purposes 40

C. Even At The Second Step Of *Chevron* Analysis, The Rule Of Lenity Governs . . 42

III. If Any Agency Deference Were Appropriate In Determining The Meaning Of "Term Of Imprisonment," Deference To The Bureau Of Prisons Would Not Be Appropriate Because The Sentencing Commission, Not The BOP, Properly Construed The Phrase, And The BOP Has Never Exercised Lawful Rule-Making Or Discretion Regarding Any Ambiguity 46

A. Any Deference Should Be Afforded To The Sentencing Commission, Which Received And Acted Upon The Explicit Delegation To Implement The Sentencing Reform Act 47

B. The BOP's Violation Of The Administrative Procedure Act Demonstrates That No Deference To The Agency Is Appropriate Because The Agency, Based On An Error Of Law, Never Exercised Discretion Or Articulated A Reason For A Harsher Interpretation Of The Statute 51

1. An Agency Interpretation Is Not Entitled To Deference If Based On An Error Of Law 51

2. The BOP Correctly Conceded That, Because The Administrative Record Included No Rationale Or Record Support For Its Interpretation, The Regulation Was Invalid As A Basis For Reading "Term Of Imprisonment" To Mean Time Served 53

3. *Skidmore* Deference Does Not Save The Agency's Rule Because The Program Statements Are Also Invalid Under § 706 And No Reasoning Supported The Program Statements 56

C. No Deference Is Warranted Under Any Standard Because The BOP's Rule Is Unreasonable 58

Conclusion 59

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama v. Smith,
490 U.S. 794 (1989) 39

Alaska Prof'l Hunters Ass'n v. FAA,
177 F.3d 1030 (D.C. Cir. 1999) 56

Arrington v. Daniels,
516 F.3d 1106 (9th Cir. 2008) 55

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,
515 U.S. 687 (1995) 46

Bailey v. United States,
516 U.S. 137 (1995) 21

Bernitt v. Martinez,
432 F.3d 868 (8th Cir. 2005) 15

Bifulco v. United States,
447 U.S. 381 (1980) 39

Brown v. Gardner,
513 U.S. 115 (1994) 21, 24

Brown v. McFadden,
416 F.3d 1271 (11th Cir. 2005) 15

Brown v. Hemingway,
53 Fed. Appx. 338 (6th Cir. 2002) 15

Burgess v. United States,
128 S. Ct. 1572 (2008) 22

Burlington Truck Lines, Inc., v. United States,
371 U.S. 156 (1962) 54, 55

Calder v. Bull,
3 U.S. (3 Dall.) 386 (1798) 38

Central Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 50

Chevron, U.S.A., Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) ..... passim

Christensen v. Harris County,
529 U.S. 576 (2000) 56

Clark v. Martinez,
543 U.S. 371 (2005) 15, 42, 45, 46

Crandon v. United States,
494 U.S. 152 (1990) 44

Crickon v. Thomas,
579 F.3d 978 (9th Cir. 2009) 55

Doe v. Chao,
540 U.S. 614 (2004) 36

Dolfi v. Pontesso,
156 F.3d 696 (6th Cir. 1998) 44

EEOC v. Arabian American Oil Co.,
499 U.S. 244 (1991) 41

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 41

Evans v. United States Parole Comm'n,
78 F.3d 262 (7th Cir. 1996) 44

Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 36

Gall v. United States,
552 U.S. 38 (2007) 58

General Dynamics Land System, Inc., v. Cline,
540 U.S. 581 (2004) 40

Glover v. United States,
531 U.S. 198 (2001) 39

Gonzales v. Oregon,
546 U.S. 243 (2006) 47, 49

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 40

INS v. St. Cyr,
533 U.S. 289 (2001) 40, 41

Jama v. Immigration and Customs Enforcement,
543 U.S. 335 (2005) 25

Kimbrough v. United States,
552 U.S. 85 (2007) 27

Ladner v. United States,
358 U.S. 169 (1958) 42

Lawson v. Suwannee Fruit & S.S. Co.,
336 U.S. 198 (1949) 22

Leocal v. Ashcroft,
543 U.S. 1 (2004) 15, 23, 41, 46

Lindsey v. Washington,
301 U.S. 397 (1937) 38

Lopez v. Davis,
531 U.S. 230 (2001) 46, 55

Lynce v. Mathis,
519 U.S. 433 (1997) 37

Miller v. Johnson,
515 U.S. 900 (1995) 45, 46

Mistretta v. United States,
488 U.S. 361 (1989) 7, 12, 43, 47, 48, 51

Moreland v. Fed. Bureau of Prisons,
547 U.S. 1106 (2006) 15

Moreland v. Fed. Bureau of Prisons,
363 F. Supp. 2d 882 (S.D. Tex. 2005),
rev'd, 431 F.3d 180 (5th Cir. 2005) 14, 32, 38

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 53, 54, 55, 56

Mujahid v. Daniels,
413 F.3d 991 (9th Cir. 2005) 15

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 41

Negusie v. Holder,
129 S. Ct. 1159 (2009) 53

Nken v. Holder,
129 S. Ct. 1749 (2009) 21

North Carolina v. Pearce,
395 U.S. 711 (1969) 39

O'Donald v. Johns,
402 F.3d 172 (3d Cir. 2005) 15

Pacheco-Camacho v. Hood,
272 F.3d 1266 (9th Cir. 2001) .. 13, 14, 15, 16, 43, 46

Paulsen v. Daniels,
413 F.3d 999 (9th Cir. 2005) 55

Perez-Olivo v. Chavez,
394 F.3d 45 (1st Cir. 2005) 15, 27

Preiser v. Rodriguez,
411 U.S. 475 (1973) 38

Raines v. U.S. Parole Comm'n,
829 F.2d 840 (9th Cir. 1987) 31

Reno v. Koray,
515 U.S. 50 (1995) 57, 58

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997)) 21

Russello v. United States,
464 U.S. 16 (1983) 25

Sash v. Zenk,
428 F.3d 132 (2d Cir. 2005), *on petition for rehearing*,
439 F.3d 61 (2d Cir. 2006) 15

Sash v. Zenk,
344 F. Supp. 2d 376 (E.D.N.Y. 2004) 42

Securities and Exchange Comm'n v. Chenery Corp.,
318 U.S. 80 (1943) 52

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 16, 20, 57, 61, 62, 63

Smith v. United States,
508 U.S. 223 (1993) 23

Spears v. United States,
129 S. Ct. 840 (2009) 27

Speiser v. Randall,
357 U.S. 513 (1958) 39

Sullivan v. Stroop,
496 U.S. 478 (1990) 24

Tablada v. Thomas,
533 F.3d 800 (9th Cir. 2008) ..... *passim*

United States v. Bass,
404 U.S. 336 (1971) 39

United States v. Granderson,
511 U.S. 39 (1994) 37

United States v. Kozminski,
487 U.S. 931 (1988) 43

United States v. McGoff,
831 F.2d 1071 (D.C. Cir. 1987) 45

United States v. Mead Corp.,
533 U.S. 218 (2001) 49, 57

United States v. R.L.C.,
503 U.S. 291 (1992) 29, 39, 40, 41, 43

United States v. Santos,
128 S. Ct. 2020 (2008) 43, 44

United States v. Thompson/Center Arms Co.,
504 U.S. 505 (1992) 41, 42

United States v. Wilson,
503 U.S. 329 (1992) 26, 49

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 42, 43

Weaver v. Graham,
450 U.S. 24 (1981) 38

Whalen v. United States,
445 U.S. 684 (1980) 43

White v. Scibana,
314 F. Supp. 2d 834 (W.D. Wis. 2004),
rev'd, 390 F.3d 997 (7th Cir. 2004) 14, 31

White v. Scibana,
390 F.3d 997 (7th Cir.2004) 15

Williams v. Dewalt,
351 F. Supp. 2d 412 (D. Md. 2004),
vacated, 2005 WL 4705074 (D. Md.
Dec. 22, 2005) 14

Williams v. Lamanna,
20 Fed. Appx. 360 (6th Cir. 2001) 14

Wolff v. McDonnell,
418 U.S. 539 (1974) 38

Wright v. Federal Bureau of Prisons,
451 F.3d 1231 (10th Cir. 2006) 15

Yi v. Federal Bureau of Prisons,
412 F.3d 526 (4th Cir. 2005) 15, 42

Zadvydas v. Davis,
533 U.S. 678 (2001) 39

DOCKETED CASES

Tablada v. Daniels,
No. 08-11034 1

FEDERAL STATUTES, REGULATIONS, AND GUIDELINES

5 U.S.C. § 706 (2006) .. 16, 20, 47, 50, 51, 53, 54, 55, 56

18 U.S.C. § 710 (1927) (superseded) 30

18 U.S.C. § 3553(a) (2006) 27

18 U.S.C. § 3561 (2006) 4

18 U.S.C. § 3562(a) (2006) 28

18 U.S.C. § 3581 (2006) 4, 17, 22, 26

18 U.S.C. § 3582(a) (2006) 27

18 U.S.C. § 3583 (2006) 5, 28

18 U.S.C. § 3585(b) (2006) 27

18 U.S.C. § 3621(a) (2006) 26

18 U.S.C. § 3624(b) (2006) ..... *passim*

18 U.S.C. § 3624(d) (2006) 27

18 U.S.C. § 3651 (repealed 1984) 4

18 U.S.C. § 4161 (repealed 1984) 5, 30

18 U.S.C. § 4165 (repealed 1984) 31

18 U.S.C. § 4205 (repealed 1984) 5

21 U.S.C. § 841(b) (2006) 26

21 U.S.C. § 843(d) (2006) 26

21 U.S.C. § 844(a) (2006) 26

21 U.S.C. § 848(a) (2006) 26

21 U.S.C. § 856(b) (2006) 26

21 U.S.C. § 860(a) (2006) 26

21 U.S.C. § 960(b) (2006) 26

21 U.S.C. § 962(a) (2006) 26

28 U.S.C. § 994 (2006) 5. 6, 7, 28, 48, 50

28 U.S.C. § 1254(1) (2006) 2

28 U.S.C. § 2241 (2006) 2

28 U.S.C. § 2253 (2006) 2

42 U.S.C. § 13704(a) (2006) 35, 36

28 C.F.R. § 0.96(s) (2009) 49

28 C.F.R. § 523.20 (2008) 3, 10

52 Fed. Reg. 3920 (Feb. 6, 1987) 7

58 Fed. Reg. 30703 (May 27, 1993) 7

62 Fed. Reg. 50786 (Sept. 26, 1997) 9

68 Fed. Reg. 37776 (June 25, 2003) 9

70 Fed. Reg. 66752 (Nov. 3, 2005) 9

U.S.S.G. ch. 1, pt. A (1990) 7

U.S.S.G. §1B1.9 (2009) 5

U.S.S.G. §1B1.10 (2009) 28

U.S.S.G. §1B1.13 (2009) 28

U.S.S.G. §5C1.1 (2009) 18, 22

U.S.S.G. ch. 5, pt. A (2009) 5

MISCELLANEOUS

Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 853 .. 30

An Act in Relation to Persons Imprisoned Under Sentence for Offenses Against the Laws of the United States, 14 Stat. 424 (1867) 30

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2044-2052 4

Criminal Law And Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592 34

Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, Title VIII, § 809(c), 110 Stat. 1321-76 ..... 3, 9

Revised Statutes of the United States, Title 70 §§ 5543, 5544, 43d Cong., 1st Sess (1873-1874) (2d ed. published 1878) 30

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102, 108 Stat. 1796 ..... 3, 9, 35

H. R. Rep. 99-797 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6138 34

H. R. Rep. No. 09-1159 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3710 34

H.R. Rep. No. 86-935 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2518 30

S. Rep. No. 98-225 (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182 ..... 5, 32, 34

131 Cong. Rec. E37-02 (daily ed. Jan. 3, 1985) 34

131 Cong. Rec. S4083-03 (daily ed. Apr. 3, 1985) .. 34

140 Cong. Rec. S12314-01 (daily ed. Aug. 23, 1994) 35

141 Cong. Rec. S2348-01 (daily ed. Feb. 9, 1995) .. 35

Edward Kennedy, *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62 (1985) 34

BLACK'S LAW DICTIONARY, 1246 (9th ed. 2009) 38

1 WILLIAM BLACKSTONE, COMMENTARIES *92 42

OPINIONS BELOW

The petitioners' cases come before this Court based largely on the incorporated record in *Tablada v. Daniels*, No. 08-11034, which remains pending before this Court on a petition for certiorari. In *Tablada*, the District Court denied habeas corpus relief in an unpublished opinion on May 11, 2007. JA-4, No. 44. The Ninth Circuit affirmed the denial of habeas corpus relief in a published opinion on July 3, 2008. JA-8, No. 28. While *Tablada* was pending, the petitioners filed their petitions, incorporating the *Tablada* pleadings. The District Court denied habeas corpus relief to Mr. Barber and Mr. Jihad-Black based on the Ninth Circuit's decision in *Tablada* on October 27, 2008. JA-1, No. 6; JA-2, No. 5. By agreement of the parties, the District Court incorporated by reference the record in *Tablada* and ordered that the Opinion and Order filed in *Tablada* be entered in the petitioners' cases. JA-13; 25. From that decision, the petitioners filed timely appeals.

On December 29, 2008, the Ninth Circuit granted the petitioners' motion to stay the appeals pending disposition of the petition for panel rehearing and rehearing en banc in *Tablada*. The Ninth Circuit denied rehearing in *Tablada* on March 20, 2009. JA-56. On April 10, 2009, the Ninth Circuit granted the parties' motion for summary affirmance based on *Tablada* and consolidated the petitioners' cases with *Tablada* for the purposes of filing a petition for writ of certiorari. JA-11. The petition for writ of certiorari in *Tablada* was submitted to this Court on June 16, 2009.

The petition in these cases was filed on July 8, 2009, and granted on November 30, 2009.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. §§ 1254(1), 2241, and 2253 (2006).

RELEVANT PROVISIONS OF LAW

The federal good time credit statute states:

(b) Credit toward service of sentence for satisfactory behavior. –

(1) Subject to paragraph (2), *a prisoner* who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, *may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment*, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward the service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be

> appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.
>
> (2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

18 U.S.C. § 3624(b) (2006) (emphasis added).[1] The BOP regulation implementing this statute states in part that "the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year." 28 C.F.R. § 523.20 (2009). JA-60. The BOP's Sentence Computation Manual,

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[1] Congress amended § 3624(b) in 1994 to provide that only non-violent offenders could earn good time credit. Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, Title II, § 20405, 108 Stat. 1796. In 1996, Congress deleted those provisions and amended § 3624(b) to adjust the vesting provisions in the administration of good time credits. Prison Litigation Reform Act of 1996 (PLRA), Pub. L. No. 104-134, Title VIII, § 809(c), 110 Stat. 1321-76. The pre-1994 version of § 3624(b) is set out at JA-58.

Program Statement 5880.28, sets out the agency's method for calculating good time credits based on time served. JA-90.[2]

STATEMENT OF THE CASE

This Court's review of the pure question of statutory construction, as well as the alternative question regarding administrative interpretation of § 3624(b), proceeds in the context of the history of the federal good time credit statute, the administrative record of the BOP's implementation of the statute, and previous litigation regarding the statute's interpretation.

The Sentencing Reform Act And The Good Time Credit Statute

Congress enacted the Sentencing Reform Act (SRA) as Title II of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 2044-2052. The SRA made federal sentencing simpler and more determinate in three ways relevant to this case. First, the SRA eliminated suspended and split sentences, providing judges with two options: imposition of a term of probation or imposition of a term of imprisonment. *Compare* 18 U.S.C. § 3651 (repealed 1984) *with* 18 U.S.C. §§ 3561 (2006) and 3581 (2006).[3] Second, the

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[2] The full Manual is available at http://www.bop.gov/policy/progstat/5880_028.pdf.

[3] The SRA modified and continued the fine, restitution, and forfeiture components of sentencing and added a mandatory fee assessment.

SRA abolished parole, authorizing a term of supervised release to follow the term of imprisonment. *Compare* 18 U.S.C. § 4205 (repealed 1984) *with* 18 U.S.C. § 3583 (2006). Third, in § 212(a), Congress replaced the good time credit statute that provided graduated available credits per month, deducted "from the term of his sentence," with a single rate based on "up to 54 days at the end of each year of the prisoner's term of imprisonment." *Compare* 18 U.S.C. § 4161 (repealed 1984) *with* 18 U.S.C. § 3624(b).

The fundamental innovation of the SRA was the authorization of sentencing guidelines that would provide a sentencing range for every offense punishable by more than six months incarceration. 28 U.S.C. § 994(a)(1), (b)(2), (c) & (m) (2006).[4] The SRA directed the Sentencing Commission to create sentencing ranges, leaving to the Commission whether the guidelines would be "in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices." S. Rep. No. 98-225, at 168 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3351. Pursuant to congressional delegation, the Commission created a Sentencing Table that provides a sentencing range at the intersection of a horizontal axis for the criminal history and a vertical axis for the seriousness of the offense. U.S.S.G. ch. 5, pt. A, Sentencing Table (2009); *see* 28 U.S.C. § 994 (c) & (d) (2006). Congress instructed the Commission to calibrate the guidelines by amassing statistics

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[4] The United States Sentencing Commission exempted from the Guidelines Class B or C misdemeanors and infractions. U.S.S.G. § 1B1.9 (2009).

regarding the actual time spent in custody for various offenders and offenses. 28 U.S.C. § 994(m).[5]

In formulating the Sentencing Table, the Commission adjusted the raw time in custody in view of the potential to receive good time credits. Recognizing that 54 is almost exactly 15 percent of 365, the Commission adjusted for good time credit "that would be earned under the guidelines" by adding 15 percent to the baseline:

> Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. *This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines.* This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) (emphasis added). JA-146. The Sentencing Table was calibrated assuming that the actual time served would be 85 percent of the sentence imposed. The Sentencing Table and the rest of the first Guidelines manual received tacit approval from

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[5] Section 994(m) required "that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served."

Congress pursuant to 28 U.S.C. § 994(a) and (x) (2006) and became effective on November 1, 1987.[6]

During the early years of the Guidelines, the Circuits split on the SRA's constitutionality. In *Mistretta v. United States*, this Court explicitly referred to § 994(m) in approving congressional delegation to the Sentencing Commission of authority to formulate sentencing guidelines. 488 U.S. 361, 375 (1989). In the 1990 version of the introduction to the Guidelines manual, the Commission incorporated its interpretation of the good time credit statute in an explanation of the SRA's goal of truth in sentencing: "Honesty is easy to achieve: the abolition of parole makes *the sentence imposed by the court* the sentence the offender will serve, *less approximately fifteen percent for good behavior*." U.S.S.G. ch. 1, pt. A, § 1, ¶3 (Nov. 1990), *reprinted in* U.S.S.G. § 1A1.1 comment. (2009) (emphasis added).[7]

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[6] Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920-02 (Feb. 6, 1987). Congress delayed § 3624(b)'s effective date until after promulgation of the Guidelines. Pub. L. 98-473, 98 Stat. 1837, 2031 (1984).

[7] Subsequently, the Parole Commission also proceeded on the assumption that 15 percent of the sentence imposed was available in good time credit. *See* Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Transferred to the United States Under Prisoner-Exchange Treaties, 58 Fed. Reg. 30703, 30703 (May 27, 1993) (final rule "requiring each release date to contain a 15 percent downward adjustment to reflect the potential good time that would reduce the sentence of similarly-situated U.S. Code offenders.").

Bureau Of Prisons Implementation Of The Good Time Credit Statute

In this litigation, the parties for the first time focused on the administrative record of the BOP's implementation of § 3624(b), which revealed that the BOP both failed to consider the Commission's 85 percent rule and did not recognize that a choice existed on how to calculate good time credits. Review of the administrative record disclosed no rationale or exercise of discretion, only an unsupported claim that the statute required that credit only be provided against time served, not the sentence imposed.

• The Public Administrative Record

The BOP's first reference to its "time served" rule occurred on November 7, 1988, when Clair Cripe, General Counsel of the BOP, issued an internal memorandum to "advise staff of the procedures for annual awards of good conduct time credit under Title 18 U.S. Code, Section 3624(b)." JA-120-21. Without explanation, the 1988 memorandum pronounced that "good time is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of time served." JA-121. However, apart from this statement, the memorandum did not describe the BOP's method of good time calculation or how the BOP arrived at that method.

In February 1992, the BOP first issued Program Statement 5880.28, which set out the complicated process for calculating good time credit under 18 U.S.C. § 3624(b) currently employed. JA-90. Program

Statement 5880.28 based its computation formula upon time served, instead of upon the term of imprisonment ordered at sentencing. The BOP provided no opportunity for the public to comment on this Program Statement before it became effective.

On September 26, 1997, the BOP issued an interim regulation "for the awarding of good conduct time." Good Conduct Time, 62 Fed. Reg. 50786 (Sept. 26, 1997). JA-62. The supplementary information that accompanied the interim rule stated: "The Bureau of Prisons is adopting interim regulations for the awarding of good conduct time for certain inmates. The awarding and vesting of good conduct time at a rate of 54 days per year . . . had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984." JA-63. The Federal Register notice did not advise that the BOP had adopted a "time served" methodology. Nor did it disclose whether the BOP had considered § 3624(b)'s use of "term of imprisonment" in the context of the SRA, or the Sentencing Commission's use of the 85 percent rule in calibrating the Sentencing Table.

The interim rule was to become effective November 3, 1997, and comments were to be submitted by November 25, 1997. JA-63. The BOP received no comments before the submission date, and the interim rule became effective. In 2003, the rule was amended to incorporate changes made by the VCCLEA and the PLRA. Good Conduct Time, 68 Fed. Reg. 37776 (June 25, 2003). JA-70. Two years later, the BOP submitted changes related to aliens and literacy and finalized the rule. Good Conduct Time, 70 Fed. Reg. 66752 (Nov. 3,

2005). JA-80. The current rule is codified at 28 C.F.R. § 523.20, which provides that the BOP will award inmates 54 days of credit toward service of a sentence as good conduct time credit "for each year served." JA-60.

- **The Implementation Of The Statute**

The BOP's formula for implementing the good time credit statute explicitly rejects crediting good time against the sentence imposed. When the BOP implemented its regulation, the agency replaced "at the end of each year of the prisoner's term of imprisonment," the phrase used in § 3624(b), with "for each year served." The Program Statement elaborates on this change by establishing a formula for awarding 54 days of good conduct time "for each full year served on a sentence in excess of one year." JA-91.

The BOP explicitly instructs its personnel to ignore the sentence imposed by the trial judge: "It is essential to learn that [good time credit] *is not* awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served." JA-99 (emphasis in original). The BOP's method – which takes 28 pages to explain – involves a process that the BOP terms "arithmetically complicated." JA-94. According to the BOP's Program Statement, the following summarizes the formula for computing good time credits on a sentence of a year and a day:

366 x .148 = 54.168 (366 + 54 = 420)

366 - 54 = 312 x .148 = 46.176 (312 + 46 = 358)

366 - 46 = 320 x .148 = 47.36 (320 + 47 = 367)

366 - 47 = 319 x .148 = 47.212 (319 + 47 = 366)

> Thus – 319 days actually served plus 47 days of good time credit equals 366 days, or a sentence of 1 year and 1 day.

JA-98. As applied to a 10-year sentence, the BOP will afford even an ideal federal prisoner no more than 470 days of good time credits, which is 70 days less than the prisoner would earn using the Commission's interpretation of the statute (54 days per year on a ten year sentence imposed equals 540 days of good time credit).

The effect of this calculation on individuals is significant. Mr. Barber was sentenced to a term of 320 months imprisonment for drug trafficking and weapons possession. The BOP calculated his scheduled release as March 29, 2016. The BOP's maximum award of good time credit based on time served is 1,254 days. If Mr. Barber's good time credit is based on the sentence imposed, the maximum available good time credit would be 1,440 days. The difference in methods results in up to 186 additional days in custody.

Mr. Jihad-Black was sentenced to a 262-month sentence for being a felon in possession of a firearm. The BOP calculated his scheduled release date as May 21, 2016, based on a maximum award of 1,027 days of good time credit under its formulation. If his good time credit is based on the sentence imposed, the maximum available good time credit would be 1,179 days. The

difference to Mr. Jihad-Black is up to 152 days additional time in custody.

- **The Discovery In This Case On The Administrative Record**

Discovery provided by the BOP is significant for what is lacking. The BOP failed to provide documents explaining what consideration went into the BOP's development of the "time served" methodology. Specifically, the BOP did not produce anything from the administrative record to evidence that the BOP considered the broader sentencing context of which § 3624(b) is a part. In the litigation below, the BOP claimed it relied on several lengthy Operations Memoranda unrelated to the maximum available good time credits. JA-3, No. 32. These memoranda appear to have been issued seriatim to guide calculation, verification, and entry of good time credit for sentences imposed during the interregnum between the SRA's effective date and this Court's decision in *Mistretta*. These memoranda shed no light on, and provide no notice of, the method by which the BOP intended to calculate a prisoner's good conduct time.[8]

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[8] Following briefing, the BOP submitted an affidavit by a BOP lawyer stating he advised a Sentencing Commission lawyer regarding the BOP's time served methodology; he also stated that meetings were held by BOP officials in December 1984 and January 1985 where the calculation of good time was discussed in light of the SRA. JA-152. The petitioner objected that the affidavit was tardy, vague, and outside the administrative record. JA-156, 161. The district court concluded that the affidavit did not add any new information to the administrative record. JA-164-66. The BOP did not contest this conclusion. JA-165.

Nothing in the administrative record reflects that the BOP had a rationale for changing – or was even aware it was changing – the preexisting method of crediting good time against the sentence imposed. The administrative record establishes: 1) the BOP exercised no discretion, apparently thinking the statute only allowed 12.8 percent good time credit; 2) no rationale was offered to justify allowance of fewer good time credits if one assumed the statute was ambiguous; and 3) no notice was provided that a choice was being made to resolve any ambiguity.

Good Time Credit Litigation

In previous litigation involving federal good time credit, the prisoners simply argued the unambiguous meaning of "term of imprisonment," raising neither the Commission's interpretation of the statute in its establishment of the Sentencing Table nor the violation of the Administrative Procedure Act (APA) in the promulgation of the BOP's rules. In the first case at the Circuit level, the petitioner, who had received a year and a day sentence, argued the statute unambiguously provided 54 days annual credit calculated on the sentence imposed; the BOP argued the statute unambiguously allowed only 47 days. *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1267-68 (9th Cir. 2001). The Ninth Circuit found that "term of imprisonment" was ambiguous based on the last sentence of the statute providing that good time credit may be earned on partial years. *Id.* Then, rather than apply the rule of lenity to the penal statute, the court of appeals deferred to the BOP's good time credit

regulation, declining to undertake a "fresh interpretation of the statute." *Id.* at 1271-72.

After *Pacheco-Camacho*, the issue was litigated nationally. Three district courts ruled that § 3624(b) unambiguously required that the BOP provide up to 54 days of good time credit against the time imposed by the sentencing judge. *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 882, 894 (S.D. Tex. 2005), *rev'd*, 431 F.3d 180 (5th Cir. 2005); *Williams v. Dewalt*, 351 F. Supp. 2d 412, 420 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. Dec. 22, 2005); *White v. Scibana*, 314 F. Supp. 2d 834, 841 (W.D. Wis. 2004), *rev'd*, 390 F.3d 997 (7th Cir. 2004). The most detailed analysis was provided in *Moreland*. All three opinions provided statutory analyses explaining why *Pacheco-Camacho* was flawed, even without considering the Commission's interpretation or the APA. *See Williams*, 351 F. Supp. 2d at 415 (characterizing court of appeals opinions as finding "§ 3624(b) to be ambiguous, after giving a cursory nod to the rules of statutory construction and deferring to the agency's interpretation").

Most courts of appeals rejected the BOP position that § 3624(b) unambiguously requires only 47 days against the term of imprisonment imposed. Two courts agreed that "term of imprisonment" unambiguously means "time served;"[9] three courts found that "term of imprisonment" is ambiguous but declared that the statute is not penal so the rule of lenity does not

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[9] *Moreland*, 431 F.3d at 181-82; *Williams v. Lamanna*, 20 Fed. Appx. 360, 361 (6th Cir. 2001).

apply;[10] and all the courts that found ambiguity depended to some degree on *Pacheco-Camacho* to find that deference to the BOP's regulation trumped the rule of lenity.[11] The opinions in the various courts of appeals did not address the administrative record's lack of rationale for the BOP's harsher interpretation, nor did they consider the argument that the Commission had interpreted and applied § 3624(b) in calibrating the Sentencing Table.

The Ninth Circuit rejected the contention that this Court's intervening rulings in *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004), and *Clark v. Martinez*, 543 U.S. 371, 380 (2005), undermined *Pacheco-Camacho*'s holding that *Chevron* deference trumped lenity, describing both cases as referencing "the rule of lenity in dicta concerning unrelated points." *Mujahid v. Daniels*, 413 F.3d 991, 999 (9th Cir. 2005). The purely statutory litigation ended with a call from Justice Stevens for further examination of federal good time credit issues. *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106 (2006) (Stevens, J., statement respecting denial of certiorari).

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[10] *Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1236 (10th Cir. 2006); *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005), *on petition for rehearing*, 439 F.3d 61 (2d Cir. 2006); *Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005).

[11] *Bernitt v. Martinez*, 432 F.3d 868, 869 (8th Cir. 2005) (per curiam); *Brown v. McFadden*, 416 F.3d 1271, 1272-73 (11th Cir. 2005) (per curiam); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 531-33 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam); *White*, 390 F.3d at 1002-03; *Brown v. Hemingway*, 53 Fed. Appx. 338, 339 (6th Cir. 2002).

Mr. Tablada's habeas corpus petition alleged for the first time facts that undermined the earlier courts of appeals decisions. JA-3, No. 21, 24. He challenged the regulation and program statements under the APA, providing evidence that the Commission had previously implemented the good time credit statute using the 85 percent rule; that the BOP had not exercised discretion; and that the administrative record lacks any rationale for the BOP's requirement that prisoners serve a minimum of 87.2 percent of the sentence imposed. Mr. Barber and Mr. Jihad-Black incorporated Mr. Tablada's litigation as the record in their cases. JA-13-25.

Prior to oral argument in the Ninth Circuit in *Tablada*, the BOP conceded that the good time credit regulation violated § 706 of the APA and asserted that any relief in this case should be limited to a procedural correction. JA-8, No. 20. Mr. Tablada responded, asserting that the concession required that relief be granted. JA-8, No. 22. Without considering the procedural validity of the program statement under the APA, the lower court upheld the BOP methodology based on *Skidmore* deference. JA-36; *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court below asserted that the Commission's "silence" constituted approval of the BOP's requirement that prisoners serve a minimum of 87.2 percent of the sentence imposed. JA-54. The Ninth Circuit also held that the implied delegation to the BOP found by *Pacheco-Camacho* trumped the Commission's interpretation. *Id.*

SUMMARY OF THE ARGUMENT

The petitioners are losing seven days of good time credit for every year of their sentence – up to 186 days for Mr. Barber and 152 days for Mr. Jihad-Black – because the BOP does not interpret "term of imprisonment" to mean the sentence imposed in 18 U.S.C. § 3624(b)(1)'s reference to "54 days at the end of each year of the prisoner's term of imprisonment." Under basic rules of statutory construction, "term of imprisonment" unambiguously means the sentence imposed, not time actually served. If there were ambiguity, the rule of lenity or, in the alternative, deference to the Sentencing Commission, would require that "term of imprisonment" be construed to mean the sentence imposed. Under no circumstances would deference to the BOP be appropriate because Congress did not delegate to the Executive agency the determination of the amount of available good time credits, the agency did not lawfully promulgate any rule construing the statute, and no rationale supports a construction of the statute that deprives prisoners of congressionally authorized good time credits.

"Term of imprisonment" means the sentence imposed, both as a term of art in federal sentencing and as the ordinary and natural meaning of the phrase. Virtually every federal prisoner hears the judge pronounce sentence with the words that the defendant is committed to the custody of the BOP for a "term of" a number of months "imprisonment." Those words are derived from the sentencing statute, which authorizes judges to sentence defendants to a "term of imprisonment" in 18 U.S.C. § 3581(a) (2006), and the

Guidelines manual, which instructs judges on the "Imposition of a Term of Imprisonment" in U.S.S.G. § 5C1.1 (2009).

The plain meaning of "term of imprisonment" is reinforced by the rule of intra-statutory consistency. The phrase "term of imprisonment" appears three times in the first sentence of § 3624(b). The BOP agrees that the phrase means the sentence imposed in its first appearance, as it must also in the second appearance. Because the rule of intra-statutory consistency is at its strongest when dealing with the use of the same phrase in the same sentence, "term of imprisonment" must mean the same thing when used the third time to set the standard against which 54 days of good time credits are awarded. The BOP's claim that "term of imprisonment" means time served, but only in one of its appearances in that sentence, contradicts the canon of construction that statutes generally do not use the same words to mean different things. In fact, Congress's use of "time served" in between two uses of "term of imprisonment" demonstrates that Congress knew how to reference that concept. The phrase "term of imprisonment" is used dozens of times throughout the SRA and, as it does in § 3624(b), always means the sentence imposed.

This interpretation is further bolstered by the history of the good time credit statute. First, federal good time credits were previously calculated against the sentence imposed, and Congress indicated no intention to change that approach. Second, Congress intended to simplify the computation of good time credits, which is as easy as calculating 15 percent of

any number, but the agency's method takes many pages of complex mathematical formulas. Third, the words of the legislators explicitly demonstrate an intention that the 54 days be counted against the sentence imposed, requiring a minimum service of 85 percent of the sentence, or that no more than 15 percent in good time credits be awarded.

If any uncertainty remained, the rule of lenity would require that "term of imprisonment" be read to mean the sentence imposed. Section 3624(b) is a penal statute because it determines the actual amount of punishment by incarceration a defendant receives. The rule of lenity is one of the "traditional tools of statutory construction" that must be applied at *Chevron's* first step to determine whether the statute is so ambiguous that the agency can construe it. Even at *Chevron*'s second step, the rule of lenity would trump agency deference to avoid separation of powers and other constitutional problems where an Executive agency would be determining the quantum of punishment.

Aside from the rule of lenity, the BOP interpretation violates *Chevron* requirements on delegation, proper promulgation of rules, and reasonableness. The BOP never received an express delegation from Congress to legislate in this area. On the other hand, this Court has held that the SRA included express delegations to the Sentencing Commission, authorizing creation of sentencing ranges implemented through the Sentencing Table, which required interpretation of the good time credit statute. In calibrating the Sentencing Table, the Commission increased the time for average

sentences by the good time credits that "would be earned under the guidelines," using the 85 percent rule based on a definition of "term of imprisonment" that equated its meaning with the sentence imposed. In 1990, the Commission reiterated its interpretation by referring to the honesty in sentencing achieved by requiring full service of the sentence imposed, less 15 percent for good time credits.

Even if deference to the BOP were theoretically appropriate, no deference is owed to the BOP under standard administrative law. The BOP conceded that it promulgated the regulation in violation of § 706 of the APA, so *Chevron* deference does not apply. Further, discovery in these cases established that no discretion was exercised: the agency acted based on the mistaken assumption that the statute required good time credits to be calculated against time served, not the sentence imposed. The agency never believed there was a choice to be made and, therefore, never provided a rationale for choosing the harsher of two potential readings. Thus, there is no reason to provide even limited *Skidmore* deference to the agency's decision. The rule is also unreasonable given the Commission's interpretation and lack of rationale for a different reading. The invalidity of the BOP's rules leaves the Sentencing Commission's 85 percent rule or, in the alternative, the norm imposed by the previous statutes, as the applicable standard.

The construction urged by the petitioners is not only required by the rules of statutory interpretation, the 85 percent rule is good public policy. The transcending value of personal liberty is undermined by failure to

provide the full measure of credit that Congress authorized for good conduct in prison. Moreover, shorting prisoners seven days for every year of their sentences creates great social costs to inmates, their families, and the taxpayers who pay for incarceration. Interpreting the good time statute consistently with the Commission's 85 percent rule achieves the simplicity in administration and public understanding that Congress intended while respecting the fundamental interest in freedom from any excessive period of incarceration.

ARGUMENT

I. "Term Of Imprisonment" Unambiguously Means The Sentence Imposed Based On The Statute's Language, The Rule Of Intra-Statutory Consistency, And The History Of The Statute.

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "'[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). In the context of the SRA, the phrase "term of imprisonment" is unambiguously synonymous with the sentence imposed. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

A. "Term Of Imprisonment" Means The Sentence Imposed Because The Judge, Following Statutory And Guidelines Terminology, Sentenced Each Petitioner To "Imprisonment" For A "Term Of" Months.

The phrase "term of imprisonment" is a term of art meaning the sentence of incarceration imposed by the judge. Congress used "term of imprisonment" to describe the judicial authority to impose sentence: "A defendant who has been found guilty of an offense may be sentenced to a *term of imprisonment*." 18 U.S.C. § 3581(a) (2006) (emphasis added). Similarly, the Guidelines manual describes the judicial task as "Imposition of a Term of Imprisonment." U.S.S.G. §5C1.1 (2009). In this context, although not explicitly set out in definitional sections, the repeated use of "term of imprisonment" in congressionally adopted descriptions of the judicial power to order incarceration implicates the rule that "'[s]tatutory definitions control the meaning of statutory words . . . in the usual case.'" *Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)).

The use of "term of imprisonment" for the sentence imposed is not only a term of art, the lay understanding of that phrase is the same based on public court proceedings. For example, Mr. Barber's judge ordered that the defendant was committed to the

custody of the BOP for "a term of 320 months imprisonment." Every time a judge orders incarceration on the Administrative Office's judgment and commitment form, the sentencing judge pronounces sentence in similar words. The defendant and all those who attend such federal sentencings hear the judge impose imprisonment for a term of months, making the sentence imposed the ordinary and natural meaning of "term of imprisonment." *Leocal*, 543 U.S. at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

B. "Term Of Imprisonment" Means The Sentence Imposed Under The Rule Of Intra-Statutory Consistency.

The statutory text repeatedly refers to the "term of imprisonment":

> [A] prisoner who is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's *term of imprisonment*, beginning at the end of the first year of the *term*. . . . [C]redit for the last year or portion of a year of the *term of imprisonment* shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1) (emphasis added). Under the rule of intra-statutory consistency, the same word or

phrase should have the same meaning throughout the statute. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). "Term of imprisonment" is used to mean the sentence imposed each time in the text of § 3624(b) and throughout the SRA.

1. Because "Term Of Imprisonment" Unambiguously Means The Sentence Imposed At Least Twice In § 3624(b), "Term Of Imprisonment" Unambiguously Means The Sentence Imposed In Its Other Uses In § 3624(b).

In the first use in § 3624(b)'s opening sentence, the BOP itself interprets "term of imprisonment" to mean the sentence imposed: the BOP unequivocally allows for good time credit on a sentence – or term of imprisonment – of a year and a day. The BOP's Program Statement provides, "[T]he very shortest sentence that can be awarded GCT is a sentence of 1 year and 1 day." JA-95. To the same effect, the second use refers to a "term of imprisonment" for life, which again can only mean the sentence imposed. The third use in the same sentence should have the same meaning because the presumption favoring intra-statutory consistency is "at its most vigorous when a term is repeated within a given sentence . . . ." *Brown*, 513 U.S. at 118.[12]

The use of "time served" in the opening sentence of § 3624(b) also demonstrates that "term of

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[12] To the same extent, "term" in the first sentence and "term of imprisonment" in the last sentence of the subsection should mean the sentence imposed.

imprisonment" does not mean time served because Congress used "time served" when it meant time served. Between the second and third uses of "term of imprisonment" in the opening sentence, Congress employed the phrase "beyond the time served" to describe how the good time credit days would be awarded. Congress used "time served" to mean actual time in custody, and "term of imprisonment" to mean the sentence imposed. Under the BOP's reading of the statute, however, the third reference to "term of imprisonment" means "time served" even though the phrase appears immediately following a reference to "time served" that means "time served." Two different phrases should not have the same meaning in the same sentence. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended).[13]

2. Throughout The Sentencing Reform Act, "Term Of Imprisonment" Is Synonymous With The Sentence Imposed.

Beyond § 3624(b), "term of imprisonment" is used throughout the SRA to mean the sentence imposed. In Title 18, the phrase "term of imprisonment" is uniformly used to mean the sentence imposed in

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[13] *Accord Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

reference to maximum and minimum sentences, consecutive and concurrent sentences, modification of the original sentence, the classification of offenses, and in contrast to probationary sentences.[11] Congress sharply distinguished the "term of imprisonment" from earlier release from actual custody based on the good time credits:

> A person who has been sentenced to a term of imprisonment pursuant to the provisions of [18 U.S.C. § 3581 *et seq.*] shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, *or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.*

18 U.S.C. § 3621(a) (2006) (emphasis added).[15] Section 3624(b)'s title references credit for "satisfactory behavior."

Congress also used "term of imprisonment" in providing direct instruction on the factors to be

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[11] Excerpts from the approximately 100 uses of "term of imprisonment" in Title 18 are set out in Pet. Appx. 54-56. "Term of imprisonment" is also consistently used in post-1984 drug statutes to describe maximum and minimum penalties. *See, e.g.*, 21 U.S.C. §§ 841(b), 843(d), 844(a), 848(a), 856(b), 860(a), 960(b), and 962(a) (2006).

[15] Congress's use of the past tense in "has been sentenced to a term of imprisonment" in § 3621(a) also establishes that "term of imprisonment" must mean the sentence imposed. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress's use of verb tense is significant in construing statutes.").

considered when the sentencing judge makes decisions regarding the imposition of sentence: "The court, in determining whether to impose a *term of imprisonment*, and, if a *term of imprisonment* is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . ." 18 U.S.C. § 3582(a) (2006) (emphasis added).[16] Similarly, the statute on sentence computation refers to a starting date for the "term of imprisonment," with a provision for credit "toward the service of the term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." 18 U.S.C. § 3585(b) (2006). The use of "term of imprisonment" to mean the sentence imposed is consistent throughout Title 18.[17]

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[16] In 18 U.S.C. § 3553(a) (2006), Congress also directed that the sentences imposed under the SRA "shall" be "sufficient, but not greater than necessary" to accomplish the purposes of sentencing. This provision militates against the BOP's stinting interpretation of the good time credit statute because the parsimony principle is the "overarching instruction" in the sentencing process. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009) (quoting *Kimbrough v. United States*, 552 U.S. 85, 111 (2007)).

[17] Of the many times "term of imprisonment" means the sentence imposed, one deviation has been suggested: "term of imprisonment" as meaning time served in 18 U.S.C. § 3624(d) ("Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment . . . ."). *Perez-Olivo*, 394 F.3d at 49. But close reading of that statute demonstrates that the phrase means the sentence imposed because the "term of imprisonment" expires upon completion of time actually served plus good time credit, allowing the prisoner to be released from custody.

The SRA's authorizing statute for the Sentencing Commission also uses "term of imprisonment" as the sentence imposed. The statute delegates the creation of guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination whether to impose a sentence to probation, a fine, or *a term of imprisonment*." 28 U.S.C. § 994(a)(1)(A) (2006) (emphasis added). Consistent with this authorization, the Guidelines manual includes over 100 references to "term of imprisonment" as the maximum or minimum sentence, the concurrent or consecutive sentence, and the type of sentence imposed by the judge. The Commission has recently used "term of imprisonment" as a synonym for the sentence imposed in guidelines for "Reduction in Term of Imprisonment."[18]

The intra-statutory use of "term of" confirms the unambiguous meaning of "term of imprisonment" as the sentence imposed. In § 994(a)(1)(A), Congress authorized Guidelines regarding imposition of probation, which is described as a "term of probation" in the statute authorizing probationary sentences. 18 U.S.C. § 3562(a). Congress also authorized the court, in a case involving a "term of imprisonment," to impose a "term of supervised release" to commence upon the completion of imprisonment. 18 U.S.C. § 3583. In federal sentencing, a "term" or "term of" means the sentence imposed, regardless of whether

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[18] U.S.S.G. §1B1.10 (2009) (App. C, amend. 712) (March 3, 2008); U.S.S.G. §1B1.13 (2009) (App. C, amend. 683) (Nov. 1, 2006).

imprisonment, probation, or supervised release is involved.

C. The History Of The Federal Good Time Credit Statute Demonstrates Congressional Intent That Good Time Credits Be Calculated Against The Sentence Imposed To Require In-Custody Service Of At Least 85 Percent Of The Sentence.

If uncertainty remained after examining the language of the statute and its context, the history of the statute confirms that "term of imprisonment" means the sentence imposed. The 54 days of credit against the 365 days of a sentence imposed yields a minimum of 85 percent of the sentence imposed that must be actually served, or a maximum of 15 percent of the sentence imposed in good time credits. The chronology, purpose, and words of legislators – before and after the effective date – substantiate that Congress intended "term of imprisonment" to mean the sentence imposed. *See United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992) (relying on legislative history to construe statute).

1. The History Of Federal Good Time Credit Statutes Demonstrates That Credit Is Measured Against The Sentence Imposed.

Congress has consistently credited good time against the sentence imposed. The predecessor statutes to § 3624(b) date from 1867, when Congress enacted a law to provide that all prisoners convicted of federal

offenses serving their time in state facilities "shall have a deduction of one month in each year made from the *term of their sentence*."[19] This structure continued for federal prisoners through the 1878 codification[20] until 1927, when Congress added graduated increased days of good time credit based on the length of the sentence. 18 U.S.C. § 710 (1927). The graduated version continued in the June 25, 1948, recodification with the deduction of good time credits "from the term of his sentence." 18 U.S.C. § 4161 (repealed 1984). Historically, credit applied against the term of the sentence, not against the time actually spent in prison.

In 1948, Congress adopted new statutory language providing for the first time that the deduction be "credited as earned and computed monthly" to clarify when the credit accrued, not to diminish the amount of the credit. Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 853. Some courts construed this language "as requiring good time to be computed on the basis of actual time served rather than on the basis of the term of the sentence as imposed by the court." H.R. Rep. No. 86-935 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2518, 2519. Thus, the present problem first occurred and was corrected almost 50 years ago: "The effect of this interpretation is to require well-behaved prisoners to serve longer periods of confinement than they would

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[19] An Act in Relation to Persons Imprisoned Under Sentence for Offenses Against the Laws of the United States, 14 Stat. 424, 424 (1867) (emphasis added).

[20] Revised Statutes of the United States, Title 70 §§ 5543, 5544, 43d Cong., 1st Sess. (1873-1874) (2d ed. published 1878).

under the method of computation which had been used through half a century." *Id.*

To correct this flawed interpretation, Congress, in 1959, deleted the purported time-served language to clarify that good conduct credit was to be calculated against the sentence imposed, not time served. *Id.* Nothing in the legislative history of the present statute indicates an intent to change this approach. When Congress enacted the SRA, it continued the formulation that applied good conduct time to the sentence by using "term of imprisonment" to refer to the incarceration portion of the sentence.[21] "Congress's long history of using an inmate's sentence to calculate good conduct time supports a conclusion that Congress would have been more explicit if it had intended to adopt a different policy." *White*, 314 F. Supp. 2d at 840.

2. By Using The 85 Percent Rule, Congress Furthered Its Purpose Of Simplification.

The simplicity of the 85 percent rule provided part of the rationale for the comprehensive sentencing reform legislation. Congress expressly referred to the need for change from "the complexity of current law" and the need to award good time credit at an "easily

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[21] "Term of imprisonment" also means the sentence imposed under the parole system. 18 U.S.C. § 4165 (repealed 1984) (providing for forfeiture of good time credits for misbehavior during the term of imprisonment); *Raines v. U.S. Parole Comm'n*, 829 F.2d 840, 844 (9th Cir. 1987) (per curium) ("Term of imprisonment [in § 4165] includes time on parole.").

determined rate." S. Rep. No. 98-225, at 147 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3330. Congress believed § 3624(b) to "be considerably less complicated than under current law in many respects." S. Rep. No. 98-225, at 146, *reprinted in* 1984 U.S.C.C.A.N. at 3329. The system for awarding good time credit at a rate of 15 percent of the sentence imposed best serves this purpose because it is as easy to calculate potential credit as it is to calculate a 15 percent tip. And the sentence to incarceration in excess of an even year is easily prorated as a fraction of 54: 180 days authorizes 27 days credit; 60 days authorizes 19 days credit; *n* days authorizes *n*/365 days x 54 = *x* days credit.

On the other hand, the BOP program statement that implements the "time served policy" contains cumbersome and confusing formulas "that even the Bureau describes as 'arithmetically complicated,' and which few, if any, prisoners could ever be expected to decipher." *Moreland*, 363 F. Supp. 2d at 888-89 (footnote omitted). The BOP formula is so complex because the prisoner cannot receive credit until the time is actually served, but the time served cannot include good time credits.[22] If the BOP had followed Congress's manifest intent to simplify the calculation of available good time credits by basing good time credits on the term imposed by the sentencing court,

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[22] The complexity also involves the unfairness of the "fraction is always dropped" rule that denies prisoners any credit on partially earned days. JA-95.

the complex formulas set forth in the program statements would be entirely unnecessary.[23]

3. Members Of Congress Repeatedly Referred To The 85 Percent Rule In A Manner That Demonstrated The Phrase "Term Of Imprisonment" Only Meant The Sentence Imposed.

Before enactment, between enactment and effective date, and after the Guidelines were effective, statements of legislative purpose reflect Congress's intention and working assumption that good time credits were to be awarded against the sentence imposed. Although subsequent legislative history is sometimes given little weight, the post-enactment history here demonstrates legislative intent to an unusual degree. Not only did legislators not know there was controversy regarding interpretation, Congress based subsequent legislation on the assumption that the federal system required incarcerated defendants to serve a minimum of 85 percent of the sentence imposed.

The 85 percent rule is based simply on the fact that 54 days is approximately 15 percent (14.8 percent) of the 365 days in a year. In an earlier draft of the good

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[23] Ironically, when estimating release dates, the BOP itself uses the 85 percent rule. BOP Program Statement 5100.08, Inmate Security Designation and Custody Classification, at ch. 4, p. 6 (Sept. 12, 2006) ("Based on the inmate's sentence(s), enter the total number of months remaining, less 15% (for sentences over 12 months), and credit for any jail time served.").

time statute, the proposed amount of good time credit would have been up to 36 days against the term of imprisonment, or "approximately 10 percent." S. Rep. No. 98-225, at 147, *reprinted in* 1984 U.S.C.C.A.N. at 3330.[24] The final version simply added 5 percent to the maximum available good time credits. H. R. Rep. No. 09-1159, at 415 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 3710, 3711 (the amendment "increases 'good time' that accrues from 10 percent to 15 percent.").

Shortly after the passage of the bill, members of Congress characterized the good time credit statute as granting a 15 percent reduction from the defendant's sentence as imposed. *See, e.g.*, 131 Cong. Rec. S4083-03 (daily ed. Apr. 3, 1985) (statement of Sen. Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'");[25] 131 Cong. Rec. E37-02, E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior.").

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[24] Although the Report refers to 36 days as "approximately 10 percent of the part of a term of imprisonment that exceeds one year," Congress enacted a technical amendment to § 3624(b) "to clarify that the good time credit can be earned for the first year of a term of imprisonment." Criminal Law And Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592; H. R. Rep. 99-797, at 21, *reprinted in* 1986 U.S.C.C.A.N. 6138, 6144.

[25] Senator Kennedy's statement included this language from an article he had published: Edward M. Kennedy, *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62, 63 (1985).

Nearly a decade after the effective date of the SRA, Congress passed a complementary statute that, as a condition of federal funding, purported to require the States to follow the federal system of limiting good time credits to 15 percent of the sentence imposed, mandating that States require service of no less than 85 percent of the sentence imposed to achieve "truth in sentencing." VCCLEA, Pub. L. No. 103-322, § 20102, 108 Stat. 1796, 1816 (1994) (as amended by Pub. L. No. 104-134, § 20104, 110 Stat. 1321, 1321-16 (1996)). In five different places, the statute required States to demonstrate that state prisoners "serve not less than 85% of the sentence imposed" as a condition of federal assistance. 42 U.S.C. § 13704(a) (2005).

Then-Senator Biden, a coauthor of § 3624(b), not only believed the federal statute provided the full 15 percent against the sentence imposed, but also intended that the same methodology would provide a limit on State good time credits:

> I was the coauthor of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time - 8.5 years, which is what the law mandates. *You can get up to 1.5 years in good time credits, but that is all.* And we abolished parole. *So you know you'll be in prison for at least 8.5 years.*

141 Cong. Rec. S2348-01, S2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden) (emphasis added); *see also* 140 Cong. Rec. S12314-01, S12350 (daily ed. Aug. 23, 1994) (statement of Sen. Biden) ("So my Republican

friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money *unless they keep their people in jail for 85 percent of the time just like we do at the Federal level* in a law written by yours truly and several others.") (emphasis added). Contrary to Congress's clear expectation, the BOP requires federal prisoners to serve a minimum of 87.2 percent of the sentence imposed – or 8.72 years on a ten-year sentence – with good time credits available of only 12.8 percent of the sentence imposed.

The legislative history and subsequent statements of Congress's intent demonstrate that good time credits should be measured against the sentence imposed. The subsequent legislative history is especially significant because "Congress has spoken subsequently and more specifically to the topic at hand." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because Congress appeared to be unaware of any uncertainty regarding the 85 percent rule, reliance on § 13704(a) and its legislative history does not carry the risks underlying this Court's general suspicion of subsequent legislative history. *See Doe v. Chao*, 540 U.S. 614, 626-27 (2004). Congress's specific and repeated use of "85% of the sentence imposed" as the measure of the State's maximum use of good time credits is strongly probative that the federal statute likewise requires minimum service of 85 percent of an imposed sentence of incarceration. In contrast, the BOP view that federal prisoners must serve at least 87.2 percent of the term imposed finds no support in the legislative history.

II. If Uncertainty Remains After Considering The Language, Context, And History Of The Statute, The Rule Of Lenity Requires That "Term Of Imprisonment" Be Construed To Mean The Sentence Imposed, Whether At The First Or Second Step Of *Chevron* Analysis.

The appellate courts that relied on *Chevron* deference failed to properly account for the role of the rule of lenity in interpreting penal statutes like § 3624(b). "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). This Court requires that the traditional rules of statutory construction, which include the rule of lenity, apply at the first step of *Chevron* analysis. Even if applied to the second step of *Chevron* analysis, the separation of powers, liberty, and notice interests that animate the rule of lenity would trump deference to the Executive agency's harsher interpretation.

A. The Federal Good Time Statute Is A Penal Statute Because Its Interpretation Determines The Actual Amount Of Incarceration A Defendant Serves.

Good time credit statutes are penal because they affect the quantum of punishment – the time actually served by the prisoner. *Lynce v. Mathis*, 519 U.S. 433, 443 (1997) (legislation retroactively denying good time reductions implicated *ex post facto* restrictions because it "had the effect of lengthening petitioner's period of

incarceration."); *Weaver v. Graham*, 450 U.S. 24, 32 (1981) (good time statute is penal for *ex post facto* purposes because "it in fact is one determinant of petitioner's prison term – and [] his effective sentence is altered once this determinant is changed").[26] Similarly, good time statutes create liberty interests under the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). In fact, because "custody" is at issue, disputes regarding good time credits must be resolved in habeas corpus proceedings. *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973).

Because the good time credit statute determines how much time is spent in custody, the standard definition of "penal" applies: "Of, relating to, or being a penalty or punishment, esp. for a crime." BLACK'S LAW DICTIONARY 1246 (9th ed. 2009). In *Moreland*, the government conceded that § 3624(b) is a penal statute. 363 F. Supp. 2d at 892. This concession was well-founded because the statute, located in Title 18, "is the final factor determining the duration of punishment ultimately meted out for criminal behavior." *Id.* For Mr. Barber, the interpretation of the statute determines whether he spends up to 186 extra days in prison; for Mr. Jihad-Black, the difference is up to 152 extra days incarceration.

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[26] A statute that is penal for *ex post facto* purposes is also penal for the purposes of the rule of lenity because the law "must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29 (citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

Freedom from unwarranted governmental custody is one of the most profound constitutional interests. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."); *Glover v. United States*, 531 U.S. 198, 203 (2001) ("our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (liberty is "an interest of transcending value.").[27] The rule of lenity embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *United States v. Bass*, 404 U.S. 336, 348 (1971) (citation omitted). If § 3624(b) is ambiguous, the precise question before this Court is whether the petitioners must serve an additional 186 and 152 days in custody that Congress – the lawmaker – did not clearly require.

Where there is ambiguity in the SRA "about the severity of sentencing," this Court applies the rule of lenity. *R.L.C.*, 503 U.S. at 305; *see Bifulco v. United States*, 447 U.S. 381, 387 (1980) (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties

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[27] *See also North Carolina v. Pearce*, 395 U.S. 711, 718-19 & n.13 (1969) (the constitutional guarantee against multiple punishments for the same offense requires that the punishment already exacted must be fully credited upon a new conviction for the same offense, "includ[ing] the time credited during service of the first prison sentence for good behavior"), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

they impose."). In *R.L.C.*, the Court found that, if any ambiguity survived its construction of the SRA's alternate maximum terms of imprisonment "authorized" for juveniles, "we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." *Id.* Because § 3624(b) is another aspect of the SRA implicating the severity of sentencing, the rule of lenity also applies to any ambiguity.

B. The Rule Of Lenity Applies At The First Step Of *Chevron* Analysis, Resolving Any Residual Ambiguity For *Chevron* Purposes.

This Court has provided a methodology for resolving residual statutory ambiguity at the first step of *Chevron* analysis: "If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). *Accord General Dynamics Land System, Inc., v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9)). In *INS v. St. Cyr*, the Court relied on *Chevron*'s footnote 9 in refusing to apply *Chevron* deference unless statutes, after "applying the normal 'tools of statutory construction,' are ambiguous." 533 U.S. 289, 320 n.45 (2001). In rejecting the agency's interpretation that an immigration statute applied retroactively, the Court in *St. Cyr* stated: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, . . . there is, for *Chevron*

purposes, no ambiguity in such a statute for an agency to resolve." *Id.*[28]

As with the doctrine against retroactivity, the rule of lenity is a "tool of statutory construction" that renders a penal statute unambiguous for *Chevron* purposes. *See R.L.C.*, 503 U.S. at 311-12 (Thomas, J., concurring) (citing *Chevron* footnote 9 in support of the proposition that the rule of lenity can "make clear an otherwise ambiguous penal statute").[29] In *Leocal*, the Court addressed the rule of lenity in determining whether the immigration agency interpreted "aggravated felony" in an overly broad manner to include drunk driving. 543 U.S. at 11 n.8. The Court noted that, if there were any lack of clarity, "we would be constrained [by the rule of lenity] to interpret any ambiguity in the statute in petitioner's favor." *Id.* In keeping with the requirement of consistency for statutes with criminal and non-criminal applications, the Court found that the rule of lenity applies "whether we encounter its application in a criminal or non-criminal context." *Id.* (citing *United States v.*

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[28] *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (applying the doctrine of constitutional avoidance instead of *Chevron* deference); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 258 (1991) (applying the presumption against extra-territorial effect rather than *Chevron* deference).

[29] *See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (suggesting that rules of construction "such as the rule of lenity" should be applied to determine whether a statute is unambiguous for *Chevron* purposes).

Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992) (plurality opinion)). Similarly, the Court applied the doctrine of constitutional avoidance without deference to the agency's interpretation that allowed the same statutory language to be applied differently to different classes of aliens. *Martinez*, 543 U.S. at 378-82.

Any uncertainty regarding the statute's meaning should be resolved by applying the most ancient and well-established principle of statutory construction – the rule of lenity – at the first step of *Chevron* analysis. The rule of lenity has roots dating to the founding of the Republic and earlier. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."); 1 WILLIAM BLACKSTONE, COMMENTARIES *92 ("A man cannot suffer more punishment than the law assigns, but he may suffer less."). When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the Court resolves the ambiguity in favor of lenity. *Ladner v. United States*, 358 U.S. 169, 178 (1958).

C. Even At The Second Step Of *Chevron* Analysis, The Rule Of Lenity Governs.

Both stare decisis and the rationale for the rule of lenity require its application at the first step of *Chevron* analysis. Nonetheless, several lower courts have found that "deference [to the agency] trumps lenity." *See, e.g.*, *Yi*, 412 F.3d at 535 (quoting *Sash v. Zenk*, 344 F. Supp. 2d 376, 383 (E.D.N.Y. 2004));

Pacheco-Camacho, 272 F.3d at 1270 (after finding "term of imprisonment" ambiguous, "we proceed to the second step of the *Chevron* analysis."). If the second step of *Chevron* is reached, the substantive rule of lenity trumps agency deference, especially where delegation to the agency is simply a legal fiction.

The rule of lenity arose to protect "the rights of individuals" and to protect Congress's power to "ordain" the punishment for crimes. *Wiltberger*, 18 U.S. at 95; *see Mistretta*, 488 U.S. at 391 n.17 (placing sentencing power in the Executive Branch would raise separation of powers questions). The rule assures "that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). Thus, it is Congress's, not the BOP's, role to set the scope of punishment for crimes. *R.L.C.*, 503 U.S. at 305 (rule of lenity prevents imprisonment "unless the lawmaker" has "clearly" provided for it); *see Whalen v. United States*, 445 U.S. 684, 695 & n.10 (1980) (to require consecutive sentences where Congress's intent is unclear would offend separation of powers and the rule of lenity).

The BOP is emphatically an Executive agency, lodged in the same Department of Justice as the prosecutors in the petitioners' underlying cases. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988) (purpose of the rule of lenity is to "maintain the proper balance between Congress, prosecutors, and courts"). Only the legislature can authorize punishment, so doubts must be resolved against additional punishment. *United States v. Santos*, 128 S. Ct. 2020,

2025 (2008) (plurality) (no citizen should be "subjected to punishment that is not clearly prescribed"). In *Crandon v. United States*, the Court rejected the Executive Branch's construction of a penal statute and, relying in part on the rule of lenity, concluded that the statute did not extend as construed by the agency. 494 U.S. 152, 168 (1990). In a concurring opinion, Justice Scalia drew a clear line between the roles of the Executive Branch and the Judicial Branch in interpreting criminal statutes: deference to Executive Branch interpretation of penal statutes "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.* at 178 (Scalia, J., concurring).

In cases involving the Parole Commission, courts in the Sixth and Seventh Circuits have recognized the separation of powers problems inherent in accepting Executive construction of ambiguous statutes to increase potential punishment. The Sixth Circuit, citing the *Crandon* concurrence, declined to defer to the Parole Commission's interpretation of a statute, stating: "Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases . . . . The rule of lenity requires a stricter construction of 'ambiguity in a criminal statute,' not deference." *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (citations omitted). "Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts." *Id.* *See also Evans v. United States Parole Comm'n*, 78 F.3d 262, 265 (7th Cir. 1996) ("[W]e have substantial doubt that the Judicial Branch owes any

deference to the Executive Branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General's interpretation of Title 18."); *United States v. McGoff*, 831 F.2d 1071, 1077, 1080 n.17 (D.C. Cir. 1987) (interpretation of a criminal statute is "far outside *Chevron* territory," and "we owe no deference to the Government's interpretation").

All of the constitutional implications of the rule of lenity are at issue here. Congress never intended that federal prisoners who demonstrate good behavior should serve 2.2% more time than what the 85 percent rule would require. The most basic liberty interest is at stake for persons faced with additional days, weeks, or months in prison.[30] As demonstrated in the administrative record, the BOP provided no effective notice of any differential between alternative good time credit calculations. The danger that the Executive is determining the quantum of punishment without legislative authorization alone creates a sufficient risk of unconstitutional deprivation of liberty to foreclose application of *Chevron* deference. *See Martinez*, 543 U.S. at 381 (the canon of constitutional avoidance rests "on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); *see also Miller v. Johnson*, 515

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[30] The seven days a year, while individually significant, also has a massive cumulative effect when applied system-wide to the federal prison population. The BOP's flawed approach has resulted in up to 36,000 years of excessive incarceration, at a cost of close to $1 billion, that Congress never clearly intended. Pet. 11.

U.S. 900, 923 (1995) ("we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the [Voting Rights] Act."). If the choice in interpreting an ambiguous penal statute is between lenity and deference to the Executive, the interests underlying the separation of powers and protection of liberty, as well as notice interests, require application of lenity. *See Leocal*, 543 U.S. at 11-12 n.8; *Martinez*, 543 U.S. at 380-81.[31]

III. If Any Agency Deference Were Appropriate In Determining The Meaning Of "Term Of Imprisonment," Deference To The Bureau Of Prisons Would Not Be Appropriate Because The Sentencing Commission, Not The BOP, Properly Construed The Phrase, And The BOP Has Never Exercised Lawful Rule-Making Or Discretion Regarding Any Ambiguity.

Even if the meaning of "term of imprisonment" could not be gleaned from statutory construction without resort to administrative deference, no deference to the

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[31] This Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), is distinguishable on a number of bases, most prominently that the agency acted within a clearly delegated area of expertise. *See also Lopez v. Davis*, 531 U.S. 230, 242, 244 (2001) (approving BOP regulation that filled statutory gap regarding unambiguously delegated discretion). Footnote 18 of the *Sweet Home* opinion, upon which *Pacheco-Camacho* relied, explicitly limited its discussion of the rule of lenity to a facial challenge to administrative regulations.

BOP is appropriate under well-established administrative law principles requiring clear delegation, proper promulgation, and reasonableness. *Chevron*, 467 U.S. at 844. Congress delegated the administration of the SRA to the Sentencing Commission, which used the 85 percent rule in calibrating the Sentencing Table. In contrast, while the BOP makes individual good time determinations for individual prisoners, the BOP received no mandate from Congress to determine the amount of available good time credits. Further, the administrative record establishes that, in formulating its good time calculation regulation, the BOP did not recognize any ambiguity in the statute and therefore exercised no discretion in construing the statute. The BOP has implicitly ceded this point in its concession that the regulation violated § 706 of the APA. Finally, the BOP's interpretation is unreasonable because it contradicts the Commission's application of § 3624(b) in the creation of the Sentencing Table upon which all federal sentences are predicated.

A. Any Deference Should Be Afforded To The Sentencing Commission, Which Received And Acted Upon The Explicit Delegation To Implement The Sentencing Reform Act.

The legitimacy of agency action depends on clear statutory delegation of authority. *Gonzales v. Oregon*, 546 U.S. 243, 255-58 (2006). As approved in *Mistretta*, Congress explicitly delegated to the Commission the administration of the SRA, of which § 3624(b) is a part. Prior to the Guidelines' effective date, the Commission acted on this delegation by utilizing "term of

imprisonment" as synonymous with the sentence imposed and by calibrating the Sentencing Table based on the 85 percent rule. In 1990, the Commission reiterated the 85 percent interpretation in amending the Guideline Manual.

In rejecting constitutional challenges to the SRA, this Court in *Mistretta* expressly approved Congress's delegation to the Commission of the duty to implement the new sentencing laws. In 28 U.S.C. § 994(m), this delegation to the Commission explicitly included the setting of initial guidelines based on "the length of such terms actually served." This in turn required the Commission to set the Sentencing Table based on actual time served plus the maximum good time credit, which necessarily required interpretation of § 3624(b). The Commission expressly calibrated the Sentencing Table to require higher sentences based on the "good time (resulting in earlier release) that would be earned under the guidelines." JA-146. The Commission acted pursuant to the authority of Congress when it set the initial guidelines using a Sentencing Table predicated on the availability of good time credit equivalent to 15 percent of the sentence imposed.

To be clear, the Commission did not appear to be deciding between ambiguous readings of "term of imprisonment." The Commission simply acted upon what it perceived to be the unambiguously expressed intent of Congress. However, to the extent Congress delegated any discretion regarding the amount of available good time credit, that delegation was to the Commission. Further, the Commission, unlike the BOP, is not an Executive agency, so deferring to the

Commission mitigates the constitutional problems surrounding Executive determination of the maximum actual incarceration a prisoner must serve to satisfy a term of imprisonment.

In contrast, the BOP received no statutory authorization to set the maximum amount of available good time credit.[32] Although Congress entrusted the BOP with the duty to determine whether a given prisoner earns good time credit based on behavior while in BOP custody, as well as how to resolve conflicts regarding the forfeiture of good time credit, Congress did not delegate to the BOP the power to set the maximum available good time credit. *See United States v. Wilson*, 503 U.S. 329, 335 (1992) (the BOP "has the responsibility for *administering* the sentence") (emphasis added); *see also Gonzales*, 546 U.S. at 267 (Congress does not delegate in vague or ancillary terms). Deference under *Chevron* is warranted only when it appears that Congress delegated authority to an agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *Gonzales*, 546 U.S. at 258 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). The BOP never received a delegation to determine the amount of available good time credit, nor did it purport to exercise such authority in the administrative record.

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[32] The BOP received only general authority from the Attorney General to approve inmate disciplinary and good time regulations. 28 C.F.R. § 0.96(s) (2009).

In this case, the Ninth Circuit erred in assuming the Commission consented to the BOP's later interpretation of the statute. JA-54. The Ninth Circuit ignored the fact that Congress approved of the Commission's adoption of 15 percent as the available good time credit. By approving the Sentencing Table and the Guidelines' use of "term of imprisonment," Congress agreed to the 85 percent interpretation. Under the SRA, once approved, the guidelines can only be changed by formal amendment, which must be preceded by notice and comment. 28 U.S.C. § 994(o), (p) & (x) (2006). The BOP, although specifically named in § 994(o) as an institution required to report when a change in the Guidelines appears warranted, took no action to suggest that an amendment to the 85 percent rule be promulgated.

Further, this Court disapproves imputing legislative intent based on silence. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994). Reliance on the Commission's supposed silence is especially inappropriate where the BOP provided no notice it was deviating from the Commission's interpretation. Not only did the BOP violate § 706 of the APA, the notices accompanying the regulation provided no basis from which to infer that the Commission acceded to the BOP interpretation of § 3624(b).[11] Given the explicit delegation recognized in

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[11] This is especially true where the regulation simply said prisoners receive 54 days of good time credit "for each year served." JA-60. The regulation could reasonably be read as providing 54 days credit for every year of the sentence imposed. Only in the Program Statement does the BOP spell out the differentiation between actual time served and sentence imposed.

Mistretta, the Commission had no reason to believe the BOP could or would arrogate to itself the interpretation of the good time credit statute.

B. The BOP's Violation Of The Administrative Procedure Act Demonstrates That No Deference To The Agency Is Appropriate Because The Agency, Based On An Error Of Law, Never Exercised Discretion Or Articulated A Reason For A Harsher Interpretation Of The Statute.

Even if the BOP had authority to construe an ambiguous statute, deference is not appropriate. The BOP conceded that its regulation violated § 706 of the APA. The BOP's reading of the statute is based on a legal error – the BOP did not believe any ambiguity existed – and, therefore, involved no special expertise or exercise of discretion justifying agency deference. *Cf.* 5 U.S.C. § 706 (2006) (reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action.").

1. An Agency Interpretation Is Not Entitled To Deference If Based On An Error Of Law.

The BOP did not presume to make an administrative construction of the statute: the BOP's position has been that it had no choice but to require service of 87.2 percent of the sentence imposed. The agency believed the statute unambiguously required that the 54 days be calculated against "time served," not the sentence imposed. The record below includes citations to the

BOP's litigation position throughout the country in which the agency consistently asserted that § 3624(b) unambiguously requires the time served formulation. JA-8, No. 11 at 18. Rather than acting on a congressional delegation of authority to interpret the statute, the BOP simply – and incorrectly – thought it was implementing unambiguous statutory terms.

In earlier litigation, the courts determined that "term of imprisonment" was ambiguous and upheld the BOP's regulation as entitled to *Chevron* deference. However, the administrative record establishes that the BOP never exercised its discretion, but rather acted on the basis of an error of statutory interpretation, failing to recognize that there was an ambiguity requiring interpretation. Instead of invalidating the BOP's improperly promulgated rule, the Ninth Circuit instead repeated the error this Court identified in *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943), where a lower court had accepted the agency's post-hoc rationale for what was in fact a simple error of law.

In *Chenery*, the SEC had adjudicated a case, imposing a requirement on a corporation because the SEC believed the law required it. *Id.* at 88-89. The corporation appealed that decision, alleging the agency action was invalid. This Court held that the agency's determination as to what the law required was incorrect, and, even though there might be grounds upon which the agency could have reached the same outcome, the courts could not provide that justification for the agency. *Id.* at 90-94. It was the responsibility of the agency to articulate contemporaneously the

rationale for its decision, rather than in arguments later made to the reviewing courts.

Similarly, this Court declined to defer to an agency's error of law in *Negusie v. Holder*, 129 S. Ct. 1159, 1166 (2009). In *Negusie*, the immigration agency erroneously believed a statute categorically barred asylum to anyone who was compelled to assist in persecution. This Court undertook an independent interpretation of the statute and deemed it ambiguous. *Id.* at 1165-66. The Court did not defer to the agency's interpretation because the agency had not exercised its *Chevron* discretion to interpret the statute in question. *Id.* at 1167.

Here, as in *Chenery* and *Negusie*, the agency's interpretation of the law was incorrect. As a consequence, the agency never made a choice between available interpretations. The BOP's error of law, which formed the basis for the agency's actions, forecloses deference, even if the Court finds the statute to be ambiguous and the rule of lenity inapplicable.

2. The BOP Correctly Conceded That, Because The Administrative Record Included No Rationale Or Record Support For Its Interpretation, The Regulation Was Invalid As A Basis For Reading "Term Of Imprisonment" To Mean Time Served.

This Court provided the analytic framework for application of § 706(2)(A) of the APA in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In *State Farm*, this Court held that, in adopting a rule, the agency is required to "examine the

relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 168 (1962)). The agency must "cogently explain why it has exercised its discretion in a given manner," and the agency's explanation must be sufficient to enable a reviewing court "to conclude that the [agency's action] was the product of reasoned decision making." *State Farm*, 463 U.S. at 48-49, 52. An agency rule is arbitrary and capricious under § 706 of the APA if the agency relied on factors Congress did not intend it to consider, "*entirely failed to consider an important aspect of the problem*," offered an explanation inconsistent with the evidence before the agency, or provided a rationale "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43 (emphasis added).

The BOP's adoption of the "time served" interpretation fails to meet the *State Farm* standards. The administrative record does not reflect BOP consideration that the Sentencing Table required longer terms of imprisonment based on the Sentencing Commission's increase in the actual incarceration baseline in reliance on its "sentence imposed" construction of the statute. Moreover, the administrative record contains no rationale or explanation for the agency action. Even if the BOP had considered the Commission's contrary interpretation of the statute, its rejection of that interpretation is not supported by any reasoning or application of agency expertise.

The BOP concedes that its regulation violated § 706 of the APA under *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), which applied this Court's *State Farm* precedent to invalidate a BOP regulation because the administrative record did not contain an adequate explanation the BOP's administrative action. JA-45. *Arrington* has its roots in footnote 6 of *Lopez*, where this Court noted that statutory authorization for a BOP rule does not resolve whether the rule is invalid under the APA. 531 U.S. at 244 n.6. In *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), the Ninth Circuit held the regulations at issue in *Lopez* to be invalid for violation of the APA's notice-and-comment requirement. The Ninth Circuit recently reaffirmed the requirement that, for a BOP rule to be valid, the agency must establish an administrative record that supports the rule. *Crickon v. Thomas*, 579 F.3d 978, 988-89 (9th Cir. 2009).

Because the BOP provided no reasoned basis for its decision to calculate good time credit based on an interpretation different from that formulated by the Sentencing Commission, the BOP's actions in calculating good time must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The BOP has not demonstrated that it "examine[d] the relevant data" nor has it "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). Articulating a rationale was particularly necessary in this case because adoption of the time served methodology was

a departure from the prior "sentence imposed" calculation. The administrative record is devoid of support for the BOP's decision to implement a "time served" method of calculating good time.

3. ***Skidmore*** *Deference Does Not Save The Agency's Rule Because The Program Statements Are Also Invalid Under § 706 And No Reasoning Supported The Program Statements.*

After the BOP's concession that its good time credit regulation violated the APA, the Ninth Circuit nonetheless upheld the BOP's good time credit rules based on deference to the program statements describing application of those rules. The program statement suffers the same procedural invalidity as the regulation, however, because, as "agency action" affecting the rights of a class of persons and deviating from historical practice, they are legislative in effect, regardless of label. *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). For the same reasons the regulation is invalid under *State Farm*, the program statements that purport to implement the regulation are also invalid.

Further, the 87.2 percent informal rule is entitled to no *Skidmore* deference by the standards of that case. None of the relevant factors supports deference: 1) "thoroughness evident in its consideration" (the BOP demonstrated no consideration of the Commission's 85

percent rule); 2) "validity of its reasoning" (the BOP provided no reasoning); 3) "consistency with earlier pronouncements" (the BOP's methodology is inconsistent with historical practice and the prior Sentencing Commission interpretation); and 4) "power to persuade" (the BOP has never proffered any argument as to why, if there is a choice, the harsher option is appropriate). *Skidmore*, 323 U.S. at 140. *Accord Mead Corp.*, 533 U.S. at 234-35 (limiting *Skidmore* to contexts where the power to persuade is based on the exercise of specialized experience and broader information than is normally available). *Skidmore* deference simply cannot be afforded to an informal agency statement, based on an erroneous understanding of the statute, that provides no rationale for the agency's interpretation.

This Court addressed *Skidmore* deference and lenity in the context of informal BOP rules in *Reno v. Koray*, 515 U.S. 50 (1995). When applied to the present case, *Koray* provides no support for any level of deference. First, this Court's discussion of *Skidmore* deference in *Koray* was dicta because the relevant statute was unambiguous when read in context and, therefore, the rule of lenity did not apply. *Id.* at 65.[34] Second, the Court allowed only "some" deference based on the articulated rationale for the interpretation of the

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[34] "The rule of lenity applies only if, 'after seizing everything from which aid can be derived' . . . we can make 'no more than a guess as to what Congress intended.' . . . That is not this case." *Id.* (citations omitted).

statute, whereas here no rationale was provided.[35] Third, only after conducting a traditional analysis of the text, structure, and history of the statute did the Court conclude that the program statement reflected "the most natural and reasonable reading." *Id.* at 61. The application of the *Skidmore* factors is an exercise in statutory interpretation; none of those factors warrants ratification of unlawful agency action simply because it has been allowed to persist over a long period of time.

C. No Deference Is Warranted Under Any Standard Because The BOP's Rule Is Unreasonable.

Even if the BOP had authority to promulgate the 87.2 percent requirement, and even if the rule were properly promulgated, the rule is unreasonable under the second step of *Chevron* analysis. Every sentence to imprisonment is based on the Sentencing Table;[36] the Sentencing Table was calibrated based on an 85 percent rule; no rationale has been offered for requiring 2.2 percent greater incarceration than the Sentencing Table assumed; the interests of individual liberty and the expense of incarceration foreclose

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[35] *Compare* JA-45 (BOP concession that "it failed to articulate in the administrative record the rationale upon which it relied when it promulgated the good time regulation") *with Koray*, 515 U.S. at 61 n.4 (setting out agency reasoning on why release to a halfway house is not "official detention").

[36] *Gall v. United States*, 552 U.S. 38, 49 (2007) (the Guidelines are "the starting point and the initial benchmark" of every sentence).

unwarranted incarceration; and, therefore, the BOP rule is unreasonable. The rule is especially unreasonable given the irrational complexity of the alternate rule that the BOP has implemented in place of the 85 percent rule adopted by the Commission and contemplated by Congress.

CONCLUSION

This Court's precedent provides a series of analytical tools, each of which independently requires that relief be granted:

- The plain language establishes that "term of imprisonment" means the sentence imposed;

- The statutory context substantiates that meaning;

- The statute's history confirms that meaning;

- The rule of lenity governs any remaining ambiguity at either the first or second step of *Chevron* analysis;

- Aside from the rule of lenity, the Court should accord any available deference to the Sentencing Commission, which interprets "term of imprisonment" to mean sentence imposed;

- No deference should be given to the BOP's interpretation because the agency acted on an error of law; the agency never exercised discretion or applied specialized expertise; and the agency never has offered a rational basis for the harsher interpretation of § 3624(b) it has imposed; and

- The BOP interpretation is fundamentally unsound and unreasonable in view of the Commission's reliance on the 85 percent rule in formulating the Sentencing Table.

If the petitioners prevail at any single level of this analysis, they are entitled to the grant of the writ of habeas corpus. By granting the requested relief, this Court protects values of individual freedom and the rule of law, while serving Congress's manifest purpose of simplifying the prediction and calculation of the minimum amount of actual incarceration resulting from imposition of a term of imprisonment.

Respectfully submitted this 14th day of January, 2010.

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

MICHAEL GARY BARBER, ET AL., PETITIONERS

v.

J.E. THOMAS, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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177

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3624(b), which provides that a federal inmate may receive credit toward the service of his sentence for exemplary conduct, requires the Federal Bureau of Prisons to calculate such credit on the basis of the sentence imposed rather than on the basis of time served.

2. Whether Congress has delegated the interpretation of 18 U.S.C. 3624(b) to the United States Sentencing Commission rather than to the Federal Bureau of Prisons.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 12
Argument:
I. Section 3624(b)(1) unambiguously requires the annual calculation of good conduct time on the basis of time served by inmates in compliance with institutional regulations 14
A. Section 3624(b)(1) requires awarding credit at the end of each year served for good conduct during that year 15
1. Section 3624(b)(1) authorizes credit for each full or partial year served of the prisoner's "term of imprisonment" 15
2. The presumption of intrastatutory consistency does not indicate that "term of imprisonment" refers to the sentence imposed rather than the time served 23
3. Other legal provisions do not demonstrate that "term of imprisonment" refers to the sentence imposed rather than the time served 27
B. Section 3624(b)(1)'s statutory and legislative history confirm that credit must be calculated on the basis of time served 29
1. The statutory history of Section 3624 indicates that awarding credit for time served is the proper method 30

Table of Contents—Continued: Page

2. The legislative history of Section 3624 indicates that awarding credit for time served is the proper method 34
II. The Bureau's interpretation of the statute that it administers is reasonable and entitled to deference 37
A. The Bureau is charged with the administration of federal prisons 37
1. The Bureau is charged with administering the awarding of good time credit 38
2. The Sentencing Commission has no authority over the administration of good time credit 39
3. The rule of lenity does not apply to Section 3624 41
B. The Bureau's interpretation of Section 3624(b)1 is reasonable and entitled to deference 46
Conclusion 52
Appendix:
18 U.S.C. 3624 (2006) 1a
Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692-693 ..... 4a
18 U.S.C. 3624(e) (Supp. I 2007) 6a
18 U.S.C. 3624 (Supp. II 1996) 7a
18 U.S.C. 3624 (1994) 8a
18 U.S.C. 3624 (1988) 13a
18 U.S.C. 4161 (1982) 16a
18 U.S.C. 4162 (1982) 17a
18 U.S.C. 4165 (1982) 17a
28 C.F.R. 523.20 ..... 18a

TABLE OF AUTHORITIES

Cases: Page

Ardestani v. *INS*, 502 U.S. 129 (1991) 17
Arrington v. *Daniels*, 516 F.3d 1106 (9th Cir. 2008) .. 11, 46
Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932) 26
Babbitt v. *Sweet Home Chap. of Cmtys. for a Great Or.*, 515 U.S. 687 (2005) 44
Bagdonas v. *Department of Treasury*, 93 F.3d 422 (7th Cir. 1996) 48
Barnhart v. *Walton*, 535 U.S. 212 (2002) 34, 50, 51, 52
Bifulco v. *United States*, 447 U.S. 381 (1980) 41, 42
Brown v. *McFadden*, 416 F.3d 1271 (11th Cir. 2005) 45
Camp v. *Pitts*, 411 U.S. 138 (1973) 47
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 14, 29, 30, 37, 50
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 46, 47
Clifford v. *Pena*, 77 F.3d 1414 (D.C. Cir. 1996) 48
Crandon v. *United States*, 494 U.S. 152 (1990) 42
Doe v. *Chao*, 540 U.S. 614 (2004) 36
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 14
FDIC v. *Meyer*, 510 U.S. 471 (1994) 19
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 48
General Dynamics Land Sys., Inc. v. *Cline*, 540 U.S. 581 (2004) 26
Ladner v. *United States*, 358 U.S. 169 (1958) 42

Cases—Continued: Page

Lopez v. *Davis*, 531 U.S. 230 (2001) 13, 38, 39, 43, 46
Lynce v. *Mathis*, 519 U.S. 433 (1997) 43
McBoyle v. *United States*, 283 U.S. 25 (1931) 44
Mistretta v. *United States*, 488 U.S. 361 (1989) 39, 40
Moreland v. *Federal Bureau of Prisons*:
431 F.3d 180 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006) 18, 19, 21, 25, 26
363 F. Supp. 2d 882 (S.D. Tex.), rev'd, 431 F.3d 180 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006) 18, 19, 43, 51
Mujahid v. *Daniels*, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006) 7, 22
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 37
Negusie v. *Holder*, 129 S. Ct 1159 (2009) 49
O'Donald v. *Jones*, 402 F.3d 172 (3d Cir. 2005) 45, 50
Pacheco-Camacho v. *Hood*, 272 F.3d 1266 (9th Cir. 2001), cert. denied, 535 U.S. 1105 (2002) ... 22, 35, 45, 51
Perez-Olivo v. *Chavez*, 394 F.3d 45 (1st Cir. 2005) ..... *passim*
Public Power Council v. *Johnson*, 674 F.2d 791 (9th Cir. 1982) 47
Reno v. *Koray*, 515 U.S. 50 (1995) 13, 38, 43
Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997) 15
Sash v. *Zenk*, 428 F.3d 132 (2d Cir. 2005), cert. denied, 549 U.S. 920 (2006) 21, 22, 35, 42, 43, 45
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 50

Cases—Continued: Page

Tablada v. *Thomas*, 533 F.3d 800 (9th Cir. 2008), petition for cert. pending, No. 08-11034 (filed June 18, 2009) 11
United States v. *Bass*, 404 U.S. 336 (1971) 44
United States v. *Clayton*, 588 F.2d 1288 (9th Cir. 1979) 38
United States v. *Evans*, 1 F.3d 654 (7th Cir. 1993) 39
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 50
United States v. *Price*, 361 U.S. 304 (1960) 36
United States v. *Wilson*, 503 U.S. 329 (1992) 38
Weaver v. *Graham*, 450 U.S. 24 (1981) 43
White v. *Scibana*, 390 F.3d 997 (7th Cir.), cert. denied, 545 U.S. 1116 (2005) 21, 23, 24, 39
Wright v. *Federal Bureau of Prisons*, 451 F.3d 1231 (10th Cir. 2006) 23, 24, 34, 36, 42
Yi v. *Federal Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005) 21, 22, 25, 45

Constitution, statutes and regulations:

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 43
Act of Mar. 2, 1867, ch. 146, 14 Stat. 424 (Rev. Stat. § 5543 (1878)) 30
Act of Mar. 5, 1872, ch. 30, 17 Stat. 35 37
Act of Mar. 3, 1891, ch. 529, § 4, 26 Stat. 839 38
Act of June 21, 1902, ch. 1140, 32 Stat. 397:
§ 1, 32 Stat. 397 ..... 30, 31
§§ 1-2, 32 Stat. 397 31
Act of May 27, 1930, ch. 340, § 8, 46 Stat. 392 31

Statutes, regulations and guidelines—Continued: Page

Act of June 25, 1948, ch. 645, 62 Stat. 683:
§ 4161, 62 Stat. 853 31
§ 4162, 62 Stat. 853 31
§ 4165, 62 Stat. 854 31
Administrative Procedure Act, 5 U.S.C. 706(2)(A) 11, 46, 47
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976 3
Endangered Species Act of 1993, 16 U.S.C. 1538(a)(1)(B) 44
Prison Litigation Reform Act of 1995, Tit. I, § 101(a) [Tit. VIII], 110 Stat. 1321-66 7
Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692 ..... 8, 25, 4a
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 3
§ 212(a)(2) (§ 3624), 98 Stat. 2008 4
§ 218(a)(4), 98 Stat. 2027 ..... 4, 32
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20412, 108 Stat. 1828 7
5 U.S.C. 301 38
18 U.S.C. 924(c)(1)(D)(ii) 27
18 U.S.C. 991-998 (2006 & Supp. I 2007) 40
18 U.S.C. 3142(e) 27
18 U.S.C. 3156(a)(3) 27
18 U.S.C. 3551 note 5
18 U.S.C. 3553(a) 28
18 U.S.C. 3559(a) 27

Statutes and regulations—Continued: Page

18 U.S.C. 3561(a)(3) 27
18 U.S.C. 3581(a) 27
18 U.S.C. 3582(a) 27
18 U.S.C. 3585(b) 38
18 U.S.C. 3614(b) 27
18 U.S.C. 3621-3626 (2006 & Supp. I 2007) 28, 40
18 U.S.C. 3621(a) 28
18 U.S.C. 3621(e)(2)(B) 38, 46
18 U.S.C. 3622 ..... 28, 29
18 U.S.C. 3624 (1988) 4, 6, 8, 32, 33, 49, 13a
18 U.S.C. 3624 (1994) 8, 8a
18 U.S.C. 3624 (Supp. II 1996) 8, 7a
18 U.S.C. 3624 (2006 & Supp. I 2007) ..... *passim*
18 U.S.C. 3624(a) 9
18 U.S.C. 3624(b)(1) (1988) 33
18 U.S.C. 3624(b)(1) (1994) 19
18 U.S.C. 3624(b)(1) ..... *passim*
18 U.S.C. 3624(c) (Supp. II 2008) 8, 25, 4a
18 U.S.C. 3624(c)(1) (Supp II 2008) 25, 26
18 U.S.C. 3624(c)(2) (Supp. II 2008) 25
18 U.S.C. 3624(d) 25
18 U.S.C. 3624(d)(1)-(3) 25
18 U.S.C. 4042(a)(1) 38
18 U.S.C. 4046(a) 27
18 U.S.C. 4161 (Supp. II 1948) 31
18 U.S.C. 4161 note (Supp. II 1948) 32
18 U.S.C. 4161 (1982) 2, 3, 4, 32, 33, 17a

Statutes and regulations—Continued: Page

18 U.S.C. 4162 (Supp. II 1948) 31
18 U.S.C. 4162 (1982) 3, 4, 32, 17a
18 U.S.C. 4165 (Supp. II 1948) 31
18 U.S.C. 4165 (1982) 3, 17a
28 U.S.C. 509 38
28 U.S.C. 510 38
28 U.S.C. 2241 ..... 2, 11
Exec. Order No. 11,755, 3 C.F.R. 113 (1975) 29
28 C.F.R.:
Section 0.96 38
Section 0.96(s) 38, 39
Section 523.20 ..... *passim*

Miscellaneous:

Black's Law Dictionary (9th ed. 2009) 18
131 Cong. Rec. (1985):
p. 488 36
p. 7431 36
141 Cong. Rec. 4174 (1995) 36
55 Fed. Reg. 19,189 (1990) 41
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H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. (1984) ... 34
Report of the Federal Courts Study Committee (1990) ... 4
S. Rep. No. 225, 98th Cong., 1st. Sess. (1983) 4, 34, 45

Miscellaneous—Continued: Page

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported. The opinions and orders of the district court (Pet. App. 3-12, 13-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2009. The petition for a writ of certiorari was filed on July 8, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

Petitioners are current federal prisoners convicted of various drug and weapons offenses. Pursuant to 28 U.S.C. 2241, they filed petitions for writs of habeas corpus to challenge the method used by the Federal Bureau of Prisons (Bureau) for calculating "good conduct time." Good conduct time is credit that a federal prisoner may earn toward the service of his sentence. The Bureau awards such credit for exemplary behavior while incarcerated. Petitioners claim that instead the Bureau should award credit on the basis of the sentence imposed by the district court. Because petitioners will not serve their entire sentences as a result of accumulated credit, they thus contend that they should receive credit for the time that they will never spend in prison. The district court ruled that the Bureau's method is lawful and denied the petitions. Pet. App. 3-12, 13-22. The court of appeals affirmed. *Id.* at 1-2.

1. Federal prisoners may receive credit toward the service of their sentences for exemplary behavior while incarcerated. Before 1984, their eligibility for such credit was governed by 18 U.S.C. 4161 (1982) (repealed 1984), which provided that

> [e]ach prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run.

Section 4161 previously required that a prisoner receive a good time deduction on the day that he began serving

his federal sentence, subject to forfeiture for misconduct while the prisoner was incarcerated. See 18 U.S.C. 4165 (1982) (repealed 1984). The amount of good time credit to which a prisoner was entitled depended on the length of his sentence. Section 4161 set forth five different rates for calculating credit, ranging from five days per month (for sentences of six months to a year) to ten days per month (for sentences of ten years or more).[1]

In addition to that statutory good time, a federal prisoner could earn industrial good time for "actual employment in an industry or camp." 18 U.S.C. 4162 (1982) (repealed 1984). A prisoner so employed could earn up to "three days for each month * * * for the first year or any part thereof" and "five days for each month of any succeeding year or part thereof." *Ibid.* Thus, unlike statutory good time, industrial good time was not a prospective entitlement: prisoners received industrial good time only after completing the actual labor. Moreover, industrial good time accrued at only two different rates depending on the length of a prisoner's employment, rather than five different rates depending on the length of a prisoner's sentence.

2. In 1984, Congress adopted the Comprehensive Crime Control Act, which broadly reformed the federal criminal code in such areas as sentencing, forfeiture, bail, and drug enforcement. See Pub. L. No. 98-473, Tit. II, 98 Stat. 1976. As part of that larger bill, Congress enacted the Sentencing Reform Act of 1984 (SRA),

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[1] Specifically, Section 4161 provided that federal prisoners were entitled to five days of good time deduction per month for sentences of six months to a year; six days per month for sentences of one to three years; seven days per month for sentences of three to five years; eight days per month for sentences of five to ten years; and ten days per month for sentences of ten years or more.

Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987. The SRA made a number of important changes to sentencing at the federal level. It directed the promulgation of determinate sentencing guidelines by a newly created United States Sentencing Commission; it abolished parole in favor of a system of supervised release; and it sharply curtailed reductions in sentences based on good conduct time. See, *e.g.*, *Report of the Federal Courts Study Committee* 133 (1990).

Congress reduced the amount of available good conduct time in two ways in the SRA. First, it repealed 18 U.S.C. 4161 and 4162 (1982), which had the effect of eliminating industrial good time. See § 218(a)(4), 98 Stat. 2027. Second, it enacted a new provision, 18 U.S.C. 3624 (1988), which contains a different method for the calculation of credit for good conduct. See sec. 212(a)(2), § 3624, 98 Stat. 2008; see also S. Rep. No. 225, 98th Cong., 1st. Sess. 146 (1983) (*Senate Report*). Specifically, the calculation of good time credit is governed by Section 3624(b)(1), which presently provides in part that

> a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. * * * [C]redit for the last year or portion of a year of the term of imprisonment shall

> be prorated and credited within the last six weeks of the sentence.

18 U.S.C. 3624(b)(1) (footnote omitted).

Section 3624(b)(1) changed prior law in important respects. Rather than awarding good time credit at different rates depending on the length of a prisoner's sentence, it establishes a uniform rate of 54 days per year for each prisoner. In addition, good time credit is no longer awarded prospectively when a prisoner begins serving his sentence. Instead, the Bureau must determine "at the end of each year" whether, "during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. 3624(b)(1). During the "last year or portion of a year" that the prisoner is in custody, any good conduct time is "prorated and credited within the last six weeks of the sentence." *Ibid.*

3. In the SRA, Congress provided that the new method of crediting good time would not take effect until November 1, 1987, for offenses committed after that date. See 18 U.S.C. 3551 note. In late 1984 or early 1985, members of the Bureau's Office of General Counsel and Regional Counsel Offices met to discuss the effect of the SRA on the calculation of good time. They concluded that, "in light of the statutory changes made by the SRA," good time credit once the SRA became effective should be based "[up]on the amount of time an inmate had served, not upon the sentence imposed." J.A. 153-154. In their view, the existing prospective method "would have been inconsistent with vesting of [credit] in annual increments of 54 days based on good conduct for one year." J.A. 154.

By contrast, calculating good time credit based on time served "was consistent with the Bureau's under-

standing of the SRA." J.A. 154. It also was consistent with "the correctional goals of effectively using [good conduct time] as a tool to reward good behavior and providing inmates knowledge of when they could expect to be released from prison." *Ibid.* The Bureau's legal staff recognized that "the time served methodology was different from [the Bureau's] experience with the good time provisions of 18 U.S.C. § 4161 (repealed)," but they viewed the methodology "as similar to the operation of Industrial Good Time under 18 U.S.C. § 4162 (repealed)." *Ibid.* Statutory good time would be awarded retrospectively, without regard to the length of an inmate's sentence, as industrial good time had been.

Consistent with that understanding, the Bureau's General Counsel, Clair A. Cripe, issued an internal memorandum in November 1988 "to advise staff of the procedures for annual awards of good conduct time credit" under Section 3624. J.A. 120-121 (capitalization omitted throughout). He informed staff that "the Comprehensive Crime Control Act of 1984 * * * established a new form of good time credit * * *, which is referred to as 'good conduct time' (GCT)." J.A. 121. He explained that good conduct time "is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of time served[,] unless the Bureau determines that the inmate has not satisfactorily complied with the institution disciplinary regulations." *Ibid.* Finally, General Counsel Cripe detailed the specific administrative procedures that would govern the calculation and awarding of good conduct time. J.A. 122-128.

4. For the last 21 years, the Bureau has calculated credit for good conduct on the basis of time served by federal prisoners. During that period, the Bureau has issued both informal and formal guidance explaining its

precise method of calculation. The first such statement, *Program Statement No. 5880.28: Sentence Computation Manual (CCA of 1984)* (*Program Statement 5880.28*), was issued on February 21, 1992. As it explains, "54 days of GCT may be earned for each full year served on a sentence in excess of one year, with the GCT being prorated for the last partial year." J.A. 91. Under that method, "a prisoner earns fifty-four days per year for each year served, and then the last portion of the year served is prorated based on a rate of 54/365." *Perez-Olivo* v. *Chavez*, 394 F.3d 45, 50 (1st Cir. 2005); see *Mujahid* v. *Daniels*, 413 F.3d 991, 996 (9th Cir. 2005) ("The [Bureau] prorates awards during the last year that a prisoner is incarcerated, awarding 0.148 days credit [54/365 = 0.148] per day *actually served* that year."), cert. denied, 547 U.S. 1149 (2006).

The Bureau also has promulgated formal guidance on its method of calculating good time credit. On September 26, 1997, the Bureau published an interim rule, 28 C.F.R. 523.20, for public comment. J.A. 62-66. As the Bureau recognized in its notice, "[t]he awarding and vesting of good conduct time at a rate of 54 days per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984." J.A. 63. Section 523.20 did not purport to disturb that general practice. Rather, the interim rule responded to other legal changes resulting from the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, § 20412, 108 Stat. 1828, and the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. I, § 101(a) [Tit. VIII], 110 Stat. 1321-66. The Bu-

reau did not receive any comments on Section 523.20, which became effective on November 3, 1997. J.A. 63.[2]

More than five years later, on June 25, 2003, the Bureau published a proposed change to Section 523.20 for public comment. J.A. 70-79. The change exempted certain aliens from Section 523.20's requirement of educational progress. J.A. 70-71. On November 3, 2005, after addressing a handful of comments, the Bureau finalized the rule. J.A. 80-89.

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[2] The SRA governs credit for prisoners, like petitioner Barber, who committed their offenses between November 1, 1987 and September 12, 1994. See 18 U.S.C. 3624 (1988); App., *infra*, 13a-16a. Under the SRA, credit is awarded on the basis of good behavior; it must be awarded within 15 days after the end of each year of the sentence; and it vests when awarded and is not subject to later forfeiture. As relevant here, in 1994, the VCCLEA added the requirement that a prisoner make satisfactory progress toward a high school diploma or equivalent degree, and provided that credit would not vest unless a prisoner was making such progress. See 18 U.S.C. 3624 (1994); App., *infra*, 8a-13a. Those changes apply to prisoners, like petitioner Jihad-Black, who committed their offenses between September 13, 1994 and April 25, 1996. As relevant here, in 1996, the PLRA eliminated the requirement that the Bureau award credit within 15 days after the end of each year and provided that all credit would vest on the date of a prisoner's release. See 18 U.S.C. 3624 (Supp. II 1996); App., *infra*, 7a-8a. Those changes apply to prisoners who committed their offenses after April 25, 1996. Finally, in 2008, Congress amended the provisions of Section 3624 involving prerelease custody and supervised release. See Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692 (to be codified at 18 U.S.C. 3624(c) (Supp. II 2008)); App., *infra*, 4a-7a.

Unless otherwise noted, references to Section 3624 are to the version currently in effect. Petitioners' brief (at 2-3) likewise sets forth the current version as the relevant provision of law involved. Although earlier versions are applicable to petitioners, the substantive meaning of those versions is identical to the current version on the questions presented.

5. Petitioners Michael Barber and Tahir Jihad-Black are both currently incarcerated in federal prison for various firearms and narcotics offenses.

a. On September 10, 1993, petitioner Barber was sentenced to 320 months of imprisonment, to be followed by five years of supervised release. Because of credit for time already served, the end of Barber's first full year in prison was January 4, 1994. At that time, Barber had his first annual review for credit, and he received the full 54 days. Since that time, he has received 54 days of credit at each annual review.

To date, Barber has served more than 17 years of his sentence. He has earned 918 days of good time credit (17 x 54 = 918). For the next six years, if he maintains good behavior, he will receive another 324 days of good time credit (6 x 54 = 324). On January 4, 2016, he will have earned 1242 days of credit, shortening his sentence by more than three years. Although petitioner will have 97 days of service remaining, he will continue to earn credit during that time. Specifically, after serving 85 days, he will have earned 12 additional days of credit (85 x .148 = 12). He will therefore have served his entire term of imprisonment less any time awarded for good conduct, see 18 U.S.C. 3624(a), and he will be released on March 29, 2016, after slightly more than 23 years in prison. In total, Barber will have received 1254 days of good time credit—54 days for each of his 23 full years spent in prison and a prorated 12 days for the portion of his last year spent in prison.

b. On October 3, 1997, petitioner Jihad-Black was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Because of credit for time already served, the end of Jihad-Black's first full year in prison was May 14, 1998. At that time,

Jihad-Black had his first annual review for credit, and he received the full 54 days. Since that time, he has received 54 days of credit at each annual review.

To date, Jihad-Black has served more than 12 years of his sentence. He has earned 648 days of good time credit (12 x 54 = 648). For the next seven years, if he maintains good behavior, he will receive another 378 days of good time credit (7 x 54 = 378). On May 14, 2016, he will have earned 1026 days of credit, shortening his sentence by almost three years. Although petitioner will have eight days of service remaining, he will continue to earn credit during that time. Specifically, after serving one week, he will have earned one additional day of credit (7 x .148 = 1). He will therefore have served his entire term of imprisonment less any time awarded for good conduct, and he will be released on May 21, 2016, after slightly more than 19 years in prison. In total, Jihad-Black will have received 1027 days of good time credit—54 days for each of his 19 full years spent in prison and a prorated single day for the last week spent in prison.

6. a. Petitioners claim (Br. 17-46) that they should receive good time credit for the portion of their sentences that they will never serve. Specifically, petitioner Barber contends that he should receive good time credit for the three years and five months of his sentence that he will never serve. He seeks another 186 days of good time credit: 162 days for the full three years that he will not serve (3 x 54 = 162) and 24 days for the additional five months that he will not serve (159 x .148 = 24). Petitioner Jihad-Black contends that he should receive good time credit for the nearly three years that he will never serve. He seeks another 152 days of good time credit: 108 days for the full two years that he will not

serve (2 x 54 = 108) and 44 days for the additional ten months that he will not serve (297 x .148 = 44).

b. Petitioners therefore filed petitions for writs of habeas corpus pursuant to 28 U.S.C. 2241. They claimed that when the Bureau promulgated its good time credit regulation, 28 C.F.R. 523.20, it violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), by failing to articulate a rational basis for its interpretation of Section 3624(b)(1). They also claimed that the United States Sentencing Commission, not the Bureau, had the authority to interpret Section 3624(b)(1) and had adopted a method of calculating credit on the basis of the sentence imposed rather than time served. The district court rejected petitioners' arguments and denied them relief. Pet. App. 3-10, 13-20.

c. The court of appeals affirmed. Pet. App. 1-2; see *id.* at 23-38.[3] Under its decision in *Arrington* v. *Daniels*, 516 F.3d 1106 (9th Cir. 2008), the court held that the Bureau was required to articulate the rationale for 28 C.F.R. 523.20 in the accompanying administrative record. Pet. App. 3-31. The Bureau conceded that it had not done that when promulgating Section 523.20, Pet. App. 31; the court held, however, that even in the absence of the regulation, it would defer to the internal guideline that predated the regulation, *Program Statement 5880.28*. Pet. App. 32-35. Finally, the court rejected petitioners' argument that the Sentencing Commission rather than the Bureau is the agency charged with interpreting Section 3624. *Id.* at 37.

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[3] Recognizing that the outcome of these cases was controlled by the court of appeals' decision in *Tablada* v. *Thomas*, 533 F.3d 800 (9th Cir. 2008), petition for cert. pending, No. 08-11034 (filed June 18, 2009), the parties jointly requested summary affirmance in light of that decision. Pet. App. 1-2.

SUMMARY OF ARGUMENT

I. A. Section 3624(b)(1) unambiguously requires the calculation of good time credit at the end of each full or partial year that a prisoner serves of his "term of imprisonment." The statute requires that the Bureau award credit at the end of each year of a prisoner's term; that the Bureau do so only if the prisoner has earned such credit through his behavior and educational progress; and that the Bureau prorate the final award of credit within the last six weeks of the sentence. Taken together, the statute's requirements of annual calculation, good conduct and educational progress, and proration indicate that credit should be awarded on the basis of time served by each prisoner. Section 3624(b)(1)'s clear text makes it unnecessary to consider other subsections and indeed other statutes. In any event, those other provisions do not demonstrate that the phrase "term of imprisonment" has a different meaning than time served in Section 3624(b)(1).

B. That textual conclusion is confirmed by the history of previous good time credit statutes and the legislative history of Section 3624(b)(1). Before the statute's enactment, a prisoner was entitled to a good time deduction from his sentence, based on its length, at the time he entered federal custody. Section 3624(b)(1) replaced that system of prospective entitlement with a system of retrospective award. Consistent with that change, Section 3624's legislative history indicates that good time credit should be calculated on the basis of time served. Petitioners rely on the post-enactment statements of three congresspersons, but those statements, aside from being a shaky ground for inferring congressional intent, do not indicate any intent to calculate credit based on the length of a prisoner's sentence.

II. A. Even if Section 3624(b)(1) were ambiguous, the Bureau's interpretation of the statute resolves that ambiguity. Congress and the Executive Branch have charged the Bureau, not the Sentencing Commission, with responsibility for prison administration generally and the computation of good time credit specifically. For that reason, this Court has twice deferred to the Bureau's interpretation of statutes that govern credit toward the service of prisoners' sentences. See *Reno* v. *Koray*, 515 U.S. 50, 60 (1995); *Lopez* v. *Davis*, 531 U.S. 230, 242 (2001). As those decisions demonstrate, the rule of lenity does not displace the Bureau's interpretive authority. Section 3624 is not a criminal statute to which lenity applies, and in any event the purposes of lenity are not implicated in this case.

B. The Bureau's authoritative interpretation of the statute that it is charged with administering is reasonable and entitled to deference. The court of appeals erred by holding that the Bureau had failed to explain the rationale for its regulation, 28 C.F.R. 523.20. One of the Bureau employees involved in the administrative decision-making process submitted a declaration in this case, and it shows that the Bureau's decision to adopt a time-served methodology was neither arbitrary nor capricious. But even if Section 523.20 were invalid, the court of appeals correctly held that *Program Statement 5880.28* is entitled to deference. That statement reasonably interprets the statutory language, avoids serious practical difficulties posed by petitioners' contrary interpretation, and represents the Bureau's longstanding position based on its extensive expertise in this area.

ARGUMENT

Petitioners agree (Br. 21, 37) that because this case involves an administrative agency's construction of a statute, this Court asks first "whether Congress has directly spoken to the precise question at issue," and then if the statute is "silent or ambiguous," whether "the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984) (*Chevron*). Here, Congress has directly spoken to the precise question at issue: Section 3624(b)(1) unambiguously requires that good conduct time be calculated retrospectively on the basis of the time served by the prisoner, rather than prospectively on the basis of the sentence imposed by the district court. Even assuming, however, that Section 3624(b)(1) is ambiguous as to the appropriate method for calculating good conduct time, the Bureau's interpretation of the statute is reasonable and entitled to deference.

I. SECTION 3624(b)(1) UNAMBIGUOUSLY REQUIRES THE ANNUAL CALCULATION OF GOOD CONDUCT TIME ON THE BASIS OF TIME SERVED BY INMATES IN COMPLIANCE WITH INSTITUTIONAL REGULATIONS

In this case, the precise statutory question is when and on what basis the Bureau must calculate good conduct time for federal inmates. If Congress has "directly spoken" to that question in Section 3624(b)(1), "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843; see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In determining whether Congress has spoken to the question, this Court looks to "the language itself, the specific context in which that

language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, those indicia all point in a single direction: that good conduct time must be calculated annually on the basis of time served by inmates in compliance with disciplinary regulations. That textual conclusion is confirmed by the history of previous good conduct time statutes and the legislative history accompanying Section 3624's enactment.

A. Section 3624(b)(1) Requires Awarding Credit At The End Of Each Year Served For Good Conduct During That Year

1. Section 3624(b)(1) authorizes credit for each full or partial year served of the prisoner's "term of imprisonment"

a. The eligibility of federal prisoners for good conduct time is governed by 18 U.S.C. 3624(b)(1), which provides in relevant part that

> a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. * * * [I]f the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall re-

> ceive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. * * * [C]redit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

Ibid. (footnote omitted). Section 3624(b)(1) thus authorizes the Bureau to determine, in its discretion, whether certain federal prisoners have earned credit toward the service of their sentences. Specifically, the Bureau may award "up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term." *Ibid.* The question here is whether the phrase "term of imprisonment" refers to the sentence imposed by the district court or to the time served by the prisoner.

Petitioners contend (Br. 22-23) that the phrase "term of imprisonment" is a legal term of art that refers to the sentence imposed by the district court. In their view (Br. 23-28), "term of imprisonment" has that meaning wherever it appears in Section 3624, the remainder of Title 18, and indeed the entirety of the United States Code. As a result, petitioners maintain, they should be eligible for up to 54 days of credit for each year of their respective sentences—even the years that they will never serve as a result of their accumulated good time credit. Petitioners' interpretation is inconsistent with the statutory language, which they discuss (Br. 24-25) only in passing. In addition, petitioners do not address the implementation of their proposed method—*i.e.*,

when the Bureau is supposed to calculate such credit (if the prisoner does not serve the year in federal custody) and on what basis (if the prisoner cannot demonstrate good behavior during that year).[4]

But petitioners' one-size-fits-all interpretation suffers from a more fundamental flaw. The phrase "term of imprisonment" does not have only one plausible meaning. Rather, it has two distinct and equally plausible meanings. On the one hand, it is the period of incarceration that a court imposes on a criminal defendant who has been found guilty of violating the law. On the other hand, it is the period of incarceration that the wrongdoer serves pursuant to that judgment of conviction. See *Webster's Third New International Dictionary of the English Language* 1137 (1993) (*Webster's*) (defining "imprisonment" as "the act of imprisoning or the state of being imprisoned"); see also 7 *The Oxford English Dictionary* 746 (2d ed. 1989) (defining "imprisonment" as "[t]he action of imprisoning, or fact or condition of being imprisoned"). Which usage a speaker intends will be clear only in context. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991) (recognizing that when a term has "many dictionary definitions," it "must draw its meaning from its context"). Accordingly, this Court should begin by examining the precise context in which "term of imprisonment" appears in the provision at issue, Section 3624(b)(1).

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[4] Petitioners inaccurately state that they "are losing seven days of good time credit for every year of their sentence." Br. 17. They have received—and with good behavior, will continue to receive—the full 54 days of good time credit for every year of their sentences spent in federal custody. What petitioners will not receive is any good time credit for each year of their sentences that is not spent in federal custody because of accumulated good time credit.

b. Petitioners' interpretation cannot be reconciled with Section 3624(b)(1)'s text, which requires that good time credit be calculated on the basis of time served by a federal inmate. Section 3624(b)(1) states that a prisoner may receive "up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term." The context thus clarifies that "term of imprisonment" in that phrase refers to the time that the prisoner spends incarcerated, and good time credit is earned after each year of service. The statute states that "beginning at the end of the first year of the term," and thereafter "at the end of each year," the prisoner may be awarded good time credit. See *Moreland* v. *Federal Bureau of Prisons*, 431 F.3d 180, 186 (5th Cir. 2005) ("Given its context, this language has a temporal meaning and can only refer to the end of each year the prisoner serves."), cert. denied, 547 U.S. 1106 (2006). That method of determination requires the passage of time, as the prisoner serves his "term of imprisonment," and permits the prisoner to earn good time credit only in annual increments.

Petitioners do not argue that the word "year" means anything other than "[a] consecutive 365-day period beginning at any point" or "a span of twelve months." *Black's Law Dictionary* 1754 (9th ed. 2009); see *Webster's* 2648 (defining "year" as "the period of about 365¼ solar days required for one revolution of the earth around the sun"). One district court, however, has held that by requiring calculation of credit "at the end of each year," Section 3624(b)(1) intends that the calculation occur after only 311 days of each year. See *Moreland* v. *Federal Bureau of Prisons*, 363 F. Supp. 2d 882, 887 (S.D. Tex.), rev'd, 431 F.3d 180 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006). On that court's view, if the

prisoner receives the full 54 days of good time credit, then the 311 days served and the 54 days credited will amount to one year of the sentence imposed. *Ibid.*

That approach has at least three serious flaws. First, the statute's language does not provide any "indication that 'year' has an unusual or extraordinary meaning for purposes of [S]ection 3624." *Moreland*, 431 F.3d at 186. This Court should construe that term "in accordance with its ordinary or natural meaning," *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994), as a continuous 365-day or 12-month period. Second, Section 3624(b)(1) requires the awarding of credit "at" the end of each year, not 54 days before the end of each year. Awarding credit after only 311 days of each year would replace the preposition "at" with the different preposition "before."[5] Third, as discussed in more detail below, see p. 51, *infra*, practical difficulties result from assuming that prisoners will re-

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[5] Petitioners' amici assert that credit should be applied "'at the end' of each year of the term, not after the end." NACDL Br. 7 (emphasis omitted). That assertion misunderstands Congress's statutory scheme. When a prisoner enters federal custody, the Bureau calculates his projected release date based on the assumption that he will earn all possible credit. It then sets a fixed review date for credit at the end of the prisoner's first year served. For example, a prisoner whose sentence commences on January 1 has an annual review date for credit of December 31. In the case of prisoners sentenced under the PLRA, the Bureau makes a credit determination for the preceding year on that review date; in the case of prisoners sentenced under the SRA and VCCLEA, the Bureau has 15 days from the review date to make its determination. See 18 U.S.C. 3624(b)(1) (1994). On the review date (or in some cases within 15 days thereof), if the prisoner has demonstrated good behavior and educational progress during the preceding year, he is awarded 54 days of credit. If the prisoner receives less than 54 days of credit, his projected release date is moved back accordingly. When the prisoner reaches the last year or partial year of his sentence, his final installment of credit is awarded within his last six weeks in prison.

ceive the full 54 days of credit, because their conduct and educational progress during the year often will result in some lesser award. For those reasons, the statute should be interpreted according to its terms: a prisoner's good time credit should be calculated at the end of each 365-day period that he spends in federal custody.

Moreover, unless petitioners believe that the word "year" means something less than a 365-day period, their interpretation leads to absurd results. On petitioners' interpretation, the Bureau would calculate good time credit "at the end of each year of" the sentence imposed. 18 U.S.C. 3624(b)(1). But petitioners will be relieved of serving entire years at the end of their sentences because of accumulated good time credit. Petitioners give no indication when the Bureau is supposed to calculate credit "at the end" of those deducted years, because they will no longer be in federal custody. *Ibid.* Nor do they give any indication on what basis the Bureau is to make such a calculation, because they will not have been able to demonstrate good behavior and educational progress "during th[ose] year[s]." *Ibid.*

c. Section 3624(b)(1) provides that "at the end of each year of the prisoner's term of imprisonment," the Bureau must determine whether, "during that year," the prisoner has earned good time credit. 18 U.S.C. 3624(b)(1). Specifically, the Bureau must consider whether the prisoner "has displayed exemplary compliance with institutional disciplinary regulations" and "has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree." *Ibid.* If the Bureau finds that, "during that year, the prisoner has not satisfactorily complied with such institutional regulations," it may award "no such credit" or "such lesser credit as [it] determines to be appropriate."

Ibid. The Bureau's annual determination whether to award good time credit is critically important, because "[c]redit that has not been earned may not later be granted." *Ibid.* Again, that method of annual determination requires the passage of time served, so that the Bureau can assess an inmate's conduct and educational progress during a given year.

Petitioners' approach, which would require the Bureau to award credit for time never actually served, would conflict with Section 3624(b)(1)'s requirement "that prisoners 'earn' credit under the GCT statute by 'display[ing] exemplary compliance with institutional disciplinary regulations' during the year." *Yi* v. *Federal Bureau of Prisons*, 412 F.3d 526, 532 (4th Cir. 2005) (brackets in original) (quoting 18 U.S.C. 3624(b)(1)); see *Sash* v. *Zenk*, 428 F.3d 132, 137 (2d Cir. 2005) (Sotomayor, J.) (noting "§ 3624's directive that good time be calculated at the end of each year on the basis of behavior 'during that year'—in other words, on the basis of a prisoner's actual behavior"), amended on reh'g, 439 F.3d 61 (2d Cir.), cert. denied, 549 U.S. 920 (2006); *Moreland*, 431 F.3d at 187; *White* v. *Scibana*, 390 F.3d 997, 1001 (7th Cir. 2004), cert. denied, 545 U.S. 1116 (2005).

d. Petitioners' approach is also inconsistent with the statute's requirement that "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." 18 U.S.C. 3624(b)(1). The Bureau prorates such credit by awarding a fraction of 54 days, depending on what portion of a final year the prisoner serves. Thus, the Bureau's "method of calculation could not be simpler: a prisoner earns fifty-four days per year for each year served, and then the last portion of the year served is prorated based on a rate of 54/365." *Perez-*

Olivo v. *Chavez*, 394 F.3d 45, 50 (1st Cir. 2005); see *Mujahid* v. *Daniels*, 413 F.3d 991, 996 (9th Cir. 2005) ("The [Bureau] prorates awards during the last year that a prisoner is incarcerated, awarding 0.148 days credit [54/365 = 0.148] per day *actually served* that year."), cert. denied, 547 U.S. 1149 (2006).

Petitioner Barber will serve three months as "the last * * * portion of a year" of his sentence, and petitioner Jihad-Black will serve one week. Yet instead of their prorated credit, each wants the full 54 days for that "portion" of the last year (as well as for the full years that each will not serve because of accumulated good time credit). See *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001) ("Instead of a prorated portion, Pacheco wants the entire fifty-four days of credit—even though he never served the full 365 days."), cert. denied, 535 U.S. 1105 (2002); see also *Yi*, 412 F.3d at 532. By requiring the final award of good time credit in "the last six weeks of the sentence," Congress indicated that prisoners should receive prorated credit based on the last portion of time served, not the last portion of the sentence imposed.

e. Finally, petitioners note (Br. 24-25) that Section 3624(b)(1) refers to "time served." It states that a prisoner "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." 18 U.S.C. 3624(b)(1). In petitioners' view, "Congress used 'time served' to mean actual time in custody, and 'term of imprisonment' to mean the sentence imposed." Br. 25. The more natural reading of the statutory language, however, is that the phrase "beyond the time served" indicates that credited time does not actually need to be served. See *Sash*, 428 F.3d at 137 ("[T]he

phrase 'beyond the time served' might be intended merely to explain that time credited need not be served."). In other words, the preposition "beyond" means "in addition to" in Section 3624(b)(1). See *Webster's* 210 (defining "beyond" as "in addition to"). For each year of service, a prisoner is credited not only with the 365 days spent in confinement but also with an additional 54 days not so spent.

2. The presumption of intrastatutory consistency does not indicate that "term of imprisonment" refers to the sentence imposed rather than the time served

Petitioners maintain that "'term of imprisonment' means the sentence imposed under the rule of intra-statutory consistency." Br. 23 (emphasis and capitalization omitted). As every court of appeals to consider the issue has concluded, the presumption of intrastatutory consistency is of no assistance here, because the statute does not use the phrase "term of imprisonment" consistently.

a. The phrase "term of imprisonment" appears four times in Section 3624(b)(1). The third reference is the one at issue in this case. The first two references describe when a prisoner is eligible for good time credit: "a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life" may receive good time credit. 18 U.S.C. 3624(b)(1) (footnote omitted). Those uses of the phrase "term of imprisonment" refer to the sentence imposed by the district court, because "the Bureau has to determine whether a prisoner is eligible for the credit on the first day he arrives in prison." *White*, 390 F.3d at 1001; see *Wright* v. *Federal Bureau of Prisons*, 451 F.3d 1231, 1234 (10th Cir. 2006). If the phrase referred instead to time served, "then a prisoner

'who initially would be eligible for the credit because his sentence was, say, 366 days, would become ineligible once the credit was taken into account.'" *Ibid.* (quoting *White*, 390 F.3d at 1001).

The fourth reference occurs in Section 3624(b)(1)'s final sentence, which states that "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." Context here indicates that "term of imprisonment" means time served. Congress required proration in the last six weeks of a prisoner's sentence because "the Bureau cannot predict precisely the length of the partial year at the end of a prisoner's sentence when he first sets foot in prison, for everything depends on whether good time is awarded at the end of each year." *White*, 390 F.3d at 1001-1002. On petitioners' view that "term of imprisonment" means the sentence imposed, there would be no reason to prorate the final award of credit "within the last six weeks of the sentence"; proration of a partial year could be calculated the moment that the prisoner begins serving his sentence.

b. Petitioners do not address the remainder of Section 3624, which further shows why "it is impossible to make sense of 18 U.S.C. § 3624 while giving the phrase 'term of imprisonment' one meaning throughout." *White*, 390 F.3d at 1002. For instance, Section 3624(a) provides that "[a] prisoner shall be released * * * on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence." In that context, "term of imprisonment" means the court-imposed sentence, because the Bureau must calculate a prisoner's release date by deducting good time credit from the end of that sentence. See *Perez-Olivo*, 394 F.3d at 49.

By contrast, Section 3624(d) provides that "[u]pon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner" with "suitable clothing," "an amount of money," and "transportation" to one of several locations. 18 U.S.C. 3624(d)(1)-(3). In that context, "it is beyond debate that * * * the same phrase means the time the prisoner has actually served, not the sentence[] imposed." *Moreland*, 431 F.3d at 188; see *Perez-Olivo*, 394 F.3d at 49. Congress intended that a prisoner "be furnished with these items upon release after completion of his 'time served.'" *Ibid.* Congress could not have intended that a prisoner receive those items at the expiration of the sentence imposed, "which is obviously too late in the case of an inmate who (as a result of annual GCT credits) has been released from prison before serving the full sentence imposed." *Yi*, 412 F.3d at 533.

Section 3624(c) contains the two remaining references to "term of imprisonment." It provides that the Bureau "shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." Second Chance Act of 2007 (Second Chance Act), Pub. L. No. 110-199, § 251(a), 122 Stat. 692 (to be codified at 18 U.S.C. 3624(c)(1)); see Second Chance Act § 251(a), 122 Stat. 693 (to be codified at 18 U.S.C. 3624(c)(2)) (providing that the Bureau may "place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months"). Congress intended that such prerelease custody occur in the "final months" of a prisoner's time served, not his

sentence imposed. Indeed, the contrary interpretation would lead to absurd results. Many inmates, including both petitioners Barber and Jihad-Black, will never serve the final 12 months of their court-imposed sentences because of accumulated good time credit. At least with respect to Section 3624(c)(1), if "term of imprisonment" meant the court-imposed sentence, petitioners—and all other federal prisoners with more than one year of good time credit—would not be eligible for prerelease custody.

c. Even assuming that petitioners were correct about the meaning of "term of imprisonment" elsewhere in Section 3624, the presumption of intrastatutory consistency would give way to the contrary contextual evidence. See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) ("[T]he presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.") (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)); *Moreland*, 431 F.3d at 188. As explained above, when Section 3624(b)(1) states that the Bureau may award "up to 54 days at the end of each year of the prisoner's term of imprisonment," the statutory context clarifies that "term of imprisonment" means the period of time that a prisoner spends in federal custody.

3. Other legal provisions do not demonstrate that "term of imprisonment" refers to the sentence imposed rather than the time served

Petitioners claim (Br. 22, 25-28) that other provisions of Title 18, Title 21, and the Sentencing Guidelines use

the phrase "term of imprisonment" to refer to a prisoner's judicially imposed sentence. But those provisions expressly concern the act of sentencing a defendant. They therefore shed no light on the use of "term of imprisonment" in Section 3624(b)(1), which concerns the different subject of prison administration.

a. Petitioners point (Br. 22, 26 n.14, 27) to a handful of provisions in Title 18 that govern the judicial imposition of a period of confinement, not the subsequent service of that period by a prisoner. For instance, a number of those provisions explicitly refer to imposition of sentence by the court rather than its service by the prisoner. See 18 U.S.C. 3581(a), 3582(a); see also 18 U.S.C. 924(c)(1)(D)(ii), 3561(a)(3), 3614(b), 4046(a). Other provisions expressly refer to the length of the sentence that may be imposed by the court. See, *e.g.*, 18 U.S.C. 3142(e), 3156(a)(3), 3559(a). Likewise, petitioners cite various provisions in Title 21 that prescribe "maximum and minimum penalties" for certain drug offenses. Br. 26 n.14.[6]

All of those statutes are addressed to district courts at the time of sentencing. By definition, they use "term of imprisonment" in relation to "the act of imprisoning." *Webster's* 1137. That does not resolve the separate question of whether statutes like Section 3624 that govern prison administration use "term of imprisonment" in relation to "the state of being imprisoned." *Ibid.* It is

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[6] Petitioners also rely (Br. 22, 28 & n.18) on various provisions of the Sentencing Guidelines. But as petitioners concede, those provisions involve "the maximum or minimum sentence, the concurrent or consecutive sentence, and the type of sentence imposed by the judge." Br. 28. As explained in the text, provisions that relate to the judicial imposition of a sentence are not relevant in the separate context of prison administration.

hardly surprising that Section 3624 would use "term of imprisonment" in a different way than sentencing statutes do. Unlike those other statutes, Section 3624 concerns the awarding of credit for a prisoner's conduct while incarcerated. On its face, Section 3624 is concerned with the manner of time served by federal inmates, not the type of sentences imposed by federal courts.[7]

b. Nor are the few statutes that concern the administration of imprisonment, see 18 U.S.C. 3621-3626 (2006 & Supp. I 2007), helpful in determining the meaning of "term of imprisonment" in Section 3624(b)(1). Contrary to petitioners' assertion (Br. 26), Section 3621(a) adds nothing to the analysis. That provision states that "[a] person who has been sentenced to a term of imprisonment * * * shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior." On its face, Section 3621(a) uses the phrase "term of imprisonment" in its judicial sense— *i.e.*, the "sentence[]" "imposed" by a court pursuant to which an offender is committed to federal custody. And although Section 3621(a) recognizes that prisoners may earn early release through satisfactory behavior, it says nothing about how the Bureau is to calculate such credit.

The only other use of the phrase "term of imprisonment" is related to 18 U.S.C. 3622, which permits the Bureau to temporarily release a prisoner from confine-

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[7] Contrary to petitioners' assertion (Br. 27 n.16), 18 U.S.C. 3553(a) is not relevant. Section 3553(a) instructs district courts to impose sentences that are "sufficient, but not greater than necessary" to accomplish certain purposes of the criminal laws. Section 3553(a) applies to courts in imposing sentences, not to the Bureau in awarding good time credit.

ment for certain reasons. Section 3622 does not refer to a prisoner's "term of imprisonment," but a related Executive Order does. On December 29, 1973, President Nixon issued Executive Order No. 11,755, which explains that "the [Bureau] is empowered [under Section 3622] to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment." 3 C.F.R. 113 (1975). In that context, "terms of imprisonment" clearly refers to the time served by federal prisoners; during the service of their terms, Section 3622 allows prisoners to seek paid employment in the community under certain conditions. "Term of imprisonment" carries that same ordinary meaning in the usage at issue in Section 3624(b)(1), and petitioners cannot avoid Section 3624(b)(1)'s clear text by resorting to interpretive rules about intrastatutory or interstatutory consistency.

B. Section 3624(b)(1)'s Statutory And Legislative History Confirm That Credit Must Be Calculated On The Basis Of Time Served

Petitioners incorrectly argue (Br. 29-36) that "traditional tools of statutory construction" support their interpretation. *Chevron*, 467 U.S. at 843 n.9. The text of Section 3624(b)(1) is unambiguous that good conduct time must be calculated annually on the basis of time served. But even moving beyond text, both the history of previous good time credit statutes and the legislative history of Section 3624 confirm that Congress intended the Bureau to look back each year before awarding annual good time credit. Because Section 3624's statutory and legislative history confirm that "Congress had an intention on the precise question at issue, that intention

is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

1. The statutory history of Section 3624 indicates that awarding credit for time served is the proper method

Petitioners claim that "the history of the federal good time credit statute demonstrates congressional intent that good time credits be calculated against the sentence imposed." Br. 29 (capitalization omitted). Before the Sentencing Reform Act took effect in 1987, good time credit was a prospective entitlement rather than a retrospective award. Federal inmates received deductions on the day that they set foot in prison, but could forfeit them during the service of their sentences for misconduct. One of the purposes of the SRA was to reverse that default rule: to require prisoners to earn credit during their incarceration. Petitioners' position would improperly roll back the clock to the pre-1987 era.

a. In 1867, Congress first made allowance for good time deductions. See Act of Mar. 2, 1867, ch. 146, 14 Stat. 424 (Rev. Stat. § 5543 (1878)). In 1902, Congress specified that such a deduction was to be awarded prospectively on the basis of a prisoner's sentence. It provided that any prisoner serving a sentence other than life imprisonment

> whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated, as follows, commencing on the first day of his arrival at the penitentiary, or jail.

Act of June 21, 1902 (1902 Act), ch. 1140, § 1, 32 Stat. 397. Congress thus made clear that the "deduction" from a prisoner's sentence "commenc[ed] on the first

day" of his arrival into federal custody, although the prisoner could forfeit his deduction for misconduct while incarcerated. 1902 Act §§ 1-2, 32 Stat. 397. In order to calculate how much of a deduction each prisoner should receive, Congress set forth five different rates, depending on the length of a prisoner's sentence. *Id.* § 1, 32 Stat. 397.

b. In 1930, Congress created an additional system of good time deductions for "prisoners engaged in any industry, or transferred to any camp." Act of May 27, 1930, ch. 340, § 8, 46 Stat. 392. It provided that

> each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed * * * a deduction from his sentence of not to exceed three days for each month of actual employment in said industry or said camp for the first year or any part thereof, and for any succeeding year or any part thereof not to exceed five days for each month of actual employment.

Ibid. Unlike statutory good time, industrial good time was not a prospective entitlement: prisoners received industrial good time only after completing the actual labor. Moreover, industrial good time accrued at only two different rates depending on the length of a prisoner's employment, rather than five different rates depending on the length of a prisoner's sentence.

c. In 1948, Congress codified the provisions for statutory and industrial good time at 18 U.S.C. 4161, 4162, and 4165 (Supp. II 1948), but with one important change. See Act of June 25, 1948 (1948 Act), ch. 645, §§ 4161, 4162, 4165, 62 Stat. 853, 854. For statutory good time, it provided that the "deduction" was "to be credited as earned and computed monthly." 1948 Act

§ 4161, 62 Stat. 853. The Bureau had recommended that Congress "credit good time only as it is earned," because under the previous system a prisoner received all of his deduction upon entry into the federal institution. 18 U.S.C. 4161 note (Supp. II 1948). If the prisoner's misconduct resulted in the loss of his entire good time allowance, then "he had no incentive to good behavior" during the remainder of his sentence. *Ibid.*

Despite that concern, in 1959, Congress removed the requirement that statutory good time "be credited as earned and computed monthly." As petitioners note (Br. 30), Congress expressly recognized that some courts had construed the 1948 amendment "as requiring good time to be computed on the basis of time served rather than on the basis of the term of the sentence as imposed by the court." H.R. Rep. No. 935, 86th Cong., 1st Sess. 2 (1959) (*1959 House Report*). Congress rejected that interpretation, which "require[d] well-behaved prisoners to serve longer periods of confinement than they would under the method of computation which had been used through half a century." *Ibid.*

d. The dual system for statutory and industrial good time remained in effect until 1984, when Congress enacted the SRA, which took effect in 1987. Among the other changes in the SRA, Congress sharply reduced the amount of available good time credit in two ways. First, it repealed 18 U.S.C. 4161 and 4162 (1982), which had the effect of eliminating industrial good time. See SRA § 218(a)(4), 98 Stat. 2027. Second, it replaced Section 4161 with Section 3624, which sets forth a different method for the calculation of statutory good time. Petitioners claim (Br. 31) that Section 3624 was not intended to alter the practice of awarding credit on the basis of a

prisoner's sentence, but that ignores the statutory text and history.

As a textual matter, former Section 4161 awarded good time deductions at different rates depending on the length of a prisoner's sentence. By contrast, Section 3624 establishes a uniform rate of 54 days per year for all prisoners. In addition, former Section 4161 provided that a prisoner was "entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences." Section 3624(b)(1), however, provides that "credit" is awarded "at the end of each year," if it has been "earned" by the prisoner "during that year." Indeed, as originally enacted, Section 3624 provided that "[t]he Bureau's determination [of credit] shall be made within fifteen days after the end of each year of the sentence." 18 U.S.C. 3624(b)(1) (1988). The textual differences between the two statutes reveal a purpose to move from a system of prospective entitlement to a system of retrospective award.

As a historical matter, Congress knew from the 1948 amendment and its 1959 repeal that awarding credit on the basis of time served would "require well-behaved prisoners to serve longer periods of confinement." *1959 House Report* 2. Yet Congress returned to a system that calculates credit after, not when, an inmate enters a federal institution. Although the 1948 amendment required monthly calculation and Section 3624(b)(1) requires annual calculation, the point remains that Congress well understood the consequences of a retrospective system.[8]

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[8] Since 1987, Congress has amended Section 3624 on five separate occasions. It has never disturbed the Bureau's method of calculating credit on the basis of time served by federal prisoners. That fact provides "further evidence * * * that Congress intended the [Bureau's]

2. The legislative history of Section 3624 indicates that awarding credit for time served is the proper method

a. Petitioners point (Br. 31-32) to the SRA's accompanying Senate Report. That report does not directly address whether good time credit should be calculated on the basis of the sentence imposed or time served, but it strongly suggests the latter. See *Senate Report* 56 ("A sentence that exceeds one year may be adjusted *at the end of each year* by 36 days for a prisoner's compliance with institutional regulations.") (emphasis added); *id.* at 147 ("[S]ection 3624(b) provides a uniform maximum rate of 36 days a year for all *time in prison* beyond the first year.") (emphasis added).[9] At the least, "the legislative history of the current statute does not indicate any Congressional intent to calculate credits based on the sentence imposed." *Wright*, 451 F.3d at 1235; see *Perez-Olivo*, 394 F.3d at 50.

b. As petitioners note (Br. 31-32), Congress enacted Section 3624 in part to decrease "the complexity of current law" and "the uncertainty of the prisoner as to his release date." *Senate Report* 147; see *Perez-Olivo*, 394 F.3d at 50. Congress achieved that goal in multiple ways. First, it eliminated parole, thus ensuring that courts would not impose "artificially high sentences * * * to allow for the operation of the parole system." *Senate Report* 146. Second, it eliminated industrial good time credit, and replaced the five different rates for statutory good time credit with a uniform maximum rate

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interpretation, or at least understood the interpretation as statutorily permissible." *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002).

[9] In the final version of Section 3624, Congress increased the amount of available good time credit from 36 to 54 days a year. See H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415 (1984).

of up to 54 days per year. *Id.* at 146-147; see p. 34 n.9, *supra*. Third, it provided "for automatic vesting of credit toward early release at the end of each year of satisfactory behavior." *Senate Report* 147.

Petitioners incorrectly argue (Br. 31-32) that because Congress simplified the system of good time credit, it therefore follows that it intended to adopt the simplest possible method of calculation: multiplying 54 days by the number of years in a prisoner's sentence. As explained above, "[Section] 3624 simplified the calculation in other ways." *Sash*, 428 F.3d at 137. If Congress' only goal had been simplicity, "it could have chosen not to award *any* good time credits during the last year of imprisonment (as it does for sentences of a year or less), or to award the full fifty-four days regardless of whether or not the prisoner serves the full year in prison." *Pacheco-Camacho*, 272 F.3d at 1269-1270. Instead, Congress required proration of credit in the final year because it "chose to tolerate the additional complexity in order to arrive at a more equitable result." *Ibid.* Petitioners exaggerate the degree of complexity of the time-served method, which is not overly difficult to apply to petitioners themselves or to other prisoners. See pp. 9-10, 19 n.5, *supra*. That method enables prisoners "to calculate with reasonable certainty the end of their imprisonment." *Pacheco-Camacho*, 272 F.3d at 1270-1271; see *Perez-Olivo*, 394 F.3d at 50-51.

c. Finally, petitioners rely (Br. 34-36) on certain post-enactment statements by Senator Biden, Senator Kennedy, and Representative Hamilton. Petitioners do not point to any instance in which this Court has deferred to a handful of post-enactment statements in the interpretation of a federal statute. This Court has recognized that "the views of a subsequent Congress form

a hazardous basis for inferring the intent of an earlier one," *United States* v. *Price*, 361 U.S. 304, 313 (1960), and that hazard is magnified where only a few individual congresspersons express their views. See *Doe* v. *Chao*, 540 U.S. 614, 626-627 (2004) ("[W]e have said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.") (internal quotation marks and citation omitted).

In any event, those congresspersons' statements do not even address the proper method for calculating good time credit. The statements describe the SRA as allowing prisoners to earn a 15% reduction in their sentences. Looking only at the statute's 54-day rate of credit, it would be natural to assume that the reduction functions in that way (54/365 = 14.8%). But in practice, because prisoners must serve an entire year (and not merely 311 days) to earn credit, the reduction is closer to 13% (54/419 = 12.9%). None of the congressmen's statements addressed the difference between a 13% reduction and a 15% reduction—or between calculating credit based on the time served and calculating credit based on the sentence imposed. See, *e.g.*, 141 Cong. Rec. 4174 (1995) (statement of Sen. Biden); 131 Cong. Rec. 7431 (1985) (statement of Sen. Kennedy); *id.* at 488 (statement of Rep. Hamilton). Accordingly, their "general statements" do not evince "a clear Congressional intent to calculate credits based on the sentence imposed." *Wright*, 451 F.3d at 1235; see *Perez-Olivo*, 394 F.3d at 51.

II. THE BUREAU'S INTERPRETATION OF THE STATUTE THAT IT ADMINISTERS IS REASONABLE AND ENTITLED TO DEFERENCE

Even if Section 3624(b)(1) were ambiguous, this Court should uphold the Bureau's method of calculating good time credit on the basis of time served. Those courts of appeals that have found the statute to be ambiguous have uniformly concluded that the Bureau is the agency charged with administering Section 3624 and that its interpretation of the statute is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*); *Chevron*, 467 U.S. at 843. Those courts have correctly held that the Bureau's interpretation accords with the statutory language, important penological considerations, and its own longstanding practice.

A. The Bureau Is Charged With The Administration Of Federal Prisons

The Bureau has been charged by Congress and the Attorney General with responsibility for prison administration generally and the computation of good time credit specifically. Petitioners argue that the Bureau does not have interpretive authority because the United States Sentencing Commission has such authority (Br. 47-50) and because Section 3624 is a criminal statute to which the rule of lenity applies (*id.* at 37-46). Neither of those arguments is persuasive.

1. The Bureau is charged with administering the awarding of good time credit

a. For well more than a century, the Attorney General has been granted authority over "the imprisonment or discharge of convicted offenders," Act of Mar. 5, 1872,

ch. 30, 17 Stat. 35, including the authority to promulgate rules for "the control and management" of federal prisons, Act of Mar. 3, 1891, ch. 529, § 4, 26 Stat. 839. See 5 U.S.C. 301; 28 U.S.C. 509 and 510. The Attorney General has delegated to the Bureau "the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons * * * charged with or convicted of offenses against the United States." 28 C.F.R. 0.96; see 18 U.S.C. 4042(a)(1). Of particular relevance here, the Attorney General has delegated to the Bureau the responsibility for "[a]pproving inmate disciplinary and good time regulations (18 U.S.C. 3624)." 28 C.F.R. 0.96(s).

In light of that legal framework, this Court has recognized that "[a]fter a district court sentences a federal offender, the Attorney General, through [the Bureau of Prisons], has the responsibility for administering the sentence." *United States* v. *Wilson*, 503 U.S. 329, 335 (1992); see, *e.g.*, *United States* v. *Clayton*, 588 F.2d 1288, 1292 (9th Cir. 1979). Moreover, this Court has twice deferred to the Bureau in the interpretation of statutes that govern credit toward the service of prisoners' sentences. In *Reno* v. *Koray*, 515 U.S. 50, 60-61 (1995), this Court deferred to the Bureau's interpretation of 18 U.S.C. 3585(b), which provides "credit toward the service of a term of imprisonment for any time that [a prisoner] has spent in official detention prior to the date the sentence commences." See *Koray*, 515 U.S. at 60 (deferring to "[t]he Bureau, as the agency charged with administering the credit statute"). And in *Lopez* v. *Davis*, 531 U.S. 230, 240 (2001), this Court deferred to the Bureau's interpretation of 18 U.S.C. 3621(e)(2)(B), which provides that the sentences of nonviolent offenders "may

be reduced" up to a year for "successfully completing a [substance abuse] treatment program." See *Lopez*, 531 U.S. at 242 (deferring to "the Bureau, the agency empowered to administer the early release program").

b. According to petitioners, the Bureau lacks "statutory authorization to set the maximum amount of available good time credit." Br. 49. Of course, Section 3624(b)(1) sets the maximum amount of available credit at 54 days for each year served by the prisoner. If what petitioners mean is that the Bureau lacks authority to determine the manner in which good time credit is calculated, that is incorrect. Section 0.96(s) delegates responsibility to the Bureau for approving "good time regulations," without prescribing any limits on that authority. Moreover, Section 3624(b)(1) expressly conditions awarding of credit on a "determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." The statute thus "makes it clear that it is the Bureau of Prisons, not the court, that determines whether a federal prisoner should receive good time credit." *United States* v. *Evans*, 1 F.3d 654, 654 (7th Cir. 1993) (per curiam); see *Perez-Olivo*, 394 F.3d at 52; *White*, 390 F.3d at 1001.

2. The Sentencing Commission has no authority over the administration of good time credit

a. Petitioners assert that "Congress explicitly delegated" to the Sentencing Commission "the administration of the SRA, of which § 3624(b) is a part." Br. 47. As their sole support for that assertion, petitioners cite this Court's decision in *Mistretta* v. *United States*, 488 U.S. 361 (1989). In *Mistretta*, the Court upheld the constitutionality of the Commission, which is "an independent

rulemaking body" that is "locate[d] * * * within the Judicial Branch" and that has been "entrusted by Congress with the primary task of promulgating sentencing guidelines." *Id.* at 385. But the Commission's authority to promulgate sentencing guidelines, see 28 U.S.C. 991-998 (2006 & Supp. I 2007), is distinct from the Bureau's authority over sentence administration for federal prisoners, 18 U.S.C. 3621-3626 (2006 & Supp. I 2007). Indeed, in *Mistretta* itself, this Court recognized that Congress long ago "grant[ed] corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge." 488 U.S. at 364-365.

b. Nor is there any evidence to suggest that the Commission has ever exercised interpretive authority under Section 3624. To the contrary, the Commission has recognized that the Bureau has the authority to interpret Section 3624. See Glenn Schmitt et al., U.S. Sentencing Comm'n, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* 23 (Oct. 3, 2007) <http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf> (assuming for purposes of statistical analysis that "the sentence for each offender would be reduced based on the maximum good conduct credit *allowed by the BOP*") (emphasis added); cf. *id.* at 8 n.23. The Commission has further recognized and relied on the Bureau's precise method for the calculation of credit. See United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at D-6 (2004) <http://www.ussc.gov/15_year/15_year_study_full.pdf> ("For new law guideline sentences * * *, the good time discount of 13 percent was applied by reducing the

sentence by 365/419 for sentences between 13 months and life."). In the last 21 years, the Commission has never voiced any objection to the Bureau's interpretation, including during the two comment periods on the Bureau's good-time regulation, 28 C.F.R. 523.20.[10]

3. The rule of lenity does not apply to Section 3624

a. Petitioners argue (Br. 37-46) that Section 3624 is a criminal statute to which the rule of lenity applies.[11] Every court of appeals to consider that argument has rejected it. The rule of lenity applies "to interpretations of the substantive ambit of criminal prohibitions" and "also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Section 3624, however, sets forth neither a criminal prohibition nor a criminal

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[10] Petitioners rely (Br. 48) on a supplementary report that the Sentencing Commission submitted to Congress in June 1987 explaining its development of the Guidelines. J.A. 140-151. The Commission's statement that "[p]rison time was increased by dividing by 0.85 good time when the term exceeded 12 months," J.A. 146, was merely an "estimate[]" that represented "[a]t best, * * * an amalgam of decision making processes," J.A. 144 n.64; see J.A. 143 n.63. The Commission recognized that "the length of time [an inmate] was expected to remain in prison" depended on "rules that the Bureau routinely employs to estimate release dates." J.A. 141. Petitioners also point (Br. 48) to the Commission's 1990 amendment to the Guidelines Manual. The Commission's statement that sentences are reduced by "approximately fifteen percent for good behavior," 55 Fed. Reg. 19,189 (1990), was a general estimate of the Bureau's practices, not an authoritative interpretation of Section 3624.

[11] One of petitioners' amici argues in more limited fashion that if Section 3624 is a criminal statute, then certain legal principles, including the rule of lenity, should apply. O'Donnell Amicus Br. 5, 10. But as that amicus has recognized, Section 3624 "is not a criminal statute." Appellee Br. at 53, *United States* v. *O'Donnell*, No. 09-50296 (9th Cir. argued Jan. 13, 2010).

penalty. *Sash*, 428 F.3d at 135 ("[T]he provision interpreted here defines neither the scope of criminal liability nor the penalty applicable to criminal punishment. It is not criminal in nature."); see *Wright*, 451 F.3d at 1236; *Perez-Olivo*, 394 F.3d at 53. Rather, Section 3624 sets forth an "administrative reward for compliance with prison regulations," and that such compliance results in a "sentence reduction does not make that administrative reward part of the process of criminal sentencing." *Sash*, 428 F.3d at 134.[12]

Petitioners incorrectly contend that Section 3624 triggers the rule of lenity because "[it] determines how much time is spent in custody." Br. 38. This Court has explained the rule of lenity's function as precluding an interpretation of "a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco*, 447 U.S. at 387 (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). As just noted, Section 3624 is not a criminal statute, and no interpretation of it can increase the penalty for an offense. To the contrary, the credit awarded pursuant to Section 3624 is a reduction in the punishment that has been imposed for the commission of a

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[12] Petitioners argue (Br. 43-44) that the Executive Branch is not entitled to deference in the interpretation of a criminal statute. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment). That argument depends on petitioners' erroneous characterization of Section 3624 as a criminal statute. Unlike the statute at issue in *Crandon*, Section 3624 does not define a criminal offense, and thus the Bureau does not act in a prosecutorial role in administering good time credit. *Id.* at 169, 177 (Scalia, J., concurring in the judgment). Similarly, petitioners cite (Br. 39-40, 44-45) inapposite cases involving statutes that define the scope of criminal liability or the penalty applicable to such liability.

crime.[13] Accordingly, although the credit statutes at issue in *Koray* and *Lopez* also affected how much time was spent in federal custody, this Court rejected the application of the rule of lenity to both statutes. See *Koray*, 515 U.S. at 64-65; *Lopez*, 531 U.S. at 244 n.7.

Petitioners also incorrectly contend (Br. 37-38) that Section 3624 is a criminal statute for lenity purposes because the revocation of good time credit can trigger the protections of the Ex Post Facto Clause. See *Lynce* v. *Mathis*, 519 U.S. 433, 443 (1997); *Weaver* v. *Graham*, 450 U.S. 24, 33 (1981). As then-Judge Sotomayor explained in *Sash*, "it is clear that sentencing-administration statutes may be 'criminal' for some purposes but not for others." 439 F.3d at 63. Specifically, "[t]here are good reasons to treat the *ex post facto* doctrine as more expansive than the rule of lenity." *Id.* at 64; see *id.* at 65-66 (detailing concerns of retroactivity and unfairness that call for broader application of the *ex post facto* doctrine than the rule of lenity). Application of the rule of lenity therefore must be evaluated in light of its own purposes, *id.* at 66, and as explained below, those purposes are not implicated here.

b. Even assuming that, despite *Koray* and *Lopez*, Section 3624 were a criminal statute in some sense, the rule of lenity still would not apply. Lenity is intended to

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[13] According to petitioners, "the government conceded that § 3624(b) is a penal statute" before the district court in *Moreland*, *supra*. Br. 38. What the government stated is that "Section 3624(b) is a 'penal statute' in the sense that it defines how the Bureau of Prisons is to enforce a term of imprisonment with respect to the calculation of 'good conduct time.'" Gov't Additional Briefing at 6, *Moreland*, *supra* (No. 4:04-cv-03658). The government argued, before both the district court and the court of appeals in *Moreland*, that the rule of lenity did not apply and that the Bureau's interpretation was entitled to deference. *Id.* at 6-8; Gov't C.A. Br. at 49-51, *Moreland*, *supra* (No. 05-20347).

ensure both that "legislatures and not courts * * * define criminal activity" and that regulated parties have "fair warning" of the law's content. *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). With respect to the former, Section 3624 does not define a criminal offense or impose a criminal penalty. And with respect to the latter, Section 3624(b)(1)'s text provides notice on its face of how and when good time credit is to be calculated. At the least, the Bureau's guidance on the subject, both informal and formal, provides such notice. The Bureau's interpretation has been a matter of public record since it issued *Program Statement 5880.28* in 1992 and 28 C.F.R. 523.20 in 1997. Petitioners cannot possibly claim to have lacked fair warning of the manner in which the Bureau calculates good time credit.

Nor can petitioners claim that lenity trumps the Bureau's interpretation of Section 3624. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (2005), this Court interpreted a provision of the Endangered Species Act of 1993, 16 U.S.C. 1538(a)(1)(B), that imposed civil and criminal penalties on certain actions harmful to endangered species. 515 U.S. at 690-691, 696 n.9. In interpreting that provision, the Court deferred to a regulation issued by the Department of Interior. *Id.* at 703-704. It expressly rejected the argument that "the rule of lenity should foreclose any deference * * * because the statute includes criminal penalties." *Id.* at 704 n.18. It held that the regulation at issue provided "[a]dequate notice of potential liability" because it had "existed for two decades" and gave "fair warning of its consequences." *Ibid.* As in *Babbitt*, the Bureau's interpretation of Section 3624(b)(1) is a longstanding one that offers ade-

quate notice of the procedures governing computation of good time credit. And no less than in *Babbitt*, the Bureau has "acted within a clearly delegated area of expertise." Pet. Br. 46 n.31.

For those reasons, the courts of appeals have held that the rule of lenity does not foreclose deference to the Bureau's interpretation of Section 3624. See *Yi*, 412 F.3d at 535 ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we *defer* to the agency's reasonable construction of the statute."); see also *Brown* v. *McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005) (per curiam); *O'Donald* v. *Johns*, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam), cert. denied, 547 U.S. 1106 (2006); *Perez-Olivo*, 394 F.3d at 53. Moreover, courts have held that lenity does not apply, even if Section 3624 is a criminal statute in some sense. See *Sash*, 439 F.3d at 63 ("[T]he rule of lenity does not apply to our interpretation of § 3624(b) because the calculation of good time credit does not concern criminal punishment in a way that implicates either of the purposes of the rule of lenity."); *id.* at 67 ("[E]ven if we accepted [defendant's] argument that § 3624(b) is a 'criminal' regulation in this context, we would find that adequate notice was given by the BOP regulations that interpreted it."); *Yi*, 412 F.3d at 535 ("BOP Program Statement 5880.28 and 28 C.F.R. § 523.20 provide the public with sufficient notice that GCT shall be awarded based upon time actually served."); *Pacheco-Camacho*, 272 F.3d at 1271-1272.

B. The Bureau's Interpretation Of Section 3624(b)(1) Is Reasonable And Entitled To Deference

The court of appeals erred by holding that the Bureau's regulation, 28 C.F.R. 523.20, is arbitrary and ca-

pricious under Section 706(2)(A) of the APA. Having set aside the regulation, however, the court of appeals correctly deferred to the Bureau's interpretive guidance, *Program Statement 5880.28*. Whether this Court looks to Section 523.20 or *Program Statement 5880.28*, the Bureau's interpretation of Section 3624(b)(1) is reasonable and entitled to deference.

1. In *Lopez*, this Court upheld as within the Bureau's discretion its interpretation of 18 U.S.C. 3621(e)(2)(B), which provides for early release of prisoners who successfully complete a residential substance abuse program. 531 U.S. at 242. Yet the Court declined to address whether the Bureau had complied with the APA in promulgating its regulation. *Id.* at 244 n.6. In *Arrington* v. *Daniels*, 516 F.3d 1106 (9th Cir. 2008), the court of appeals resolved that question against the Bureau. The court held that it could "look only to the administrative record," which in its view "failed to set forth a rationale" for the Bureau's regulation. *Id.* at 1112, 1114. Rather than remand to allow the Bureau to explain its rationale, see *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), the court set aside the regulation as arbitrary and capricious. *Arrington*, 516 F.3d at 1116.

In this case, the Bureau conceded before the court of appeals that it could not prevail under the reasoning of *Arrington*. When the Bureau first promulgated 28 C.F.R. 523.20 in 1997, it was responding to changes that Congress made to Section 3624 in the mid-1990s in the VCCLEA and PLRA. See J.A. 62-66. The Bureau did not address the rationale for its underlying time-served methodology in the 1997 regulation, because that methodology had been in effect for nearly a decade without challenge. See Pet. Br. 13-14. In 2003, the Bureau pub-

lished an unrelated change to Section 523.20 for public comment, see J.A. 70-79, and, in 2005, the Bureau finalized the rule as amended, see J.A. 80-89. By that time, every court of appeals to consider the issue had upheld the Bureau's interpretation as reasonable. The Bureau did not address the rationale for its methodology in the 2005 regulation, because no prisoner had argued that the earlier administrative record was insufficient. Petitioners raised that argument for the first time in this case.[14]

Petitioners contended below that Section 523.20 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Although judicial review under that standard is ordinarily based on the administrative record before the agency at the time of its decision, *Overton Park*, 401 U.S. at 420, this Court has drawn a narrow exception for informal agency action when "there was such failure to explain [the] action as to frustrate effective judicial review," *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973) (per curiam). In that case, the correct remedy is "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Id.* at 143; see, *e.g.*, *Public Power Council* v. *Johnson*, 674 F.2d 791, 793 (9th Cir. 1982); Charles Alan Wright & Charles H. Koch,

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[14] In order to correct any perceived oversight in the administrative record, the Bureau is submitting an interim rule (to be codified at 28 C.F.R. 523.20) to the Department of Justice and the Office of Management and Budget (OMB) for their consideration. The OMB will have 90 days to review the interim rule, after which the rule will become effective. The text of the rule is unchanged from its current version, but the accompanying notice explains the rationale for the Bureau's interpretation of Section 3624(b)(1).

Jr., *Federal Practice and Procedure: Judicial Review* § 8306, at 78 (2006); cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

This case presents the rare circumstance in which remand to the agency is not necessary, because the Bureau has supplied a declaration that explains its reasons for adopting a time-served methodology. J.A. 152-155. The declaration is from Harlan W. Penn, one of the Bureau's attorneys who participated in the decision-making process.[15] See, *e.g.*, *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996) ("Here, however, the agency provided something more than counsel's argument. It provided the court with an explanation for the agency's action submitted by the officer who had the authority to act on the application."); *Clifford* v. *Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) (affirming district court's consideration of an affidavit from an agency employee who had participated in decision-making process).

Mr. Penn explains that, after the SRA's enactment, members of the Bureau's Office of General Counsel and Regional Counsel Offices met to discuss the Act's effect on the calculation of good time. They concluded that, "in light of the statutory changes made by the SRA," good time credit should be based "[up]on the amount of time an inmate had served, not upon the sentence imposed." J.A. 153-154. In their view, the previous method "would

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[15] Before the district court, petitioners objected to consideration of Mr. Penn's declaration. Pet. Br. 12 n.8. The district court overruled that objection and held that the declaration was part of the record. J.A. 165-166. Contrary to petitioners' assertion (Br. 12 n.8), neither the district court nor the government stated that the declaration failed to add any information to the record (although the court did not rely on the declaration in rejecting petitioners' claims, J.A. 16-24).

have been inconsistent with vesting of [credit] in annual increments of 54 days based on good conduct for one year." J.A. 154. By contrast, calculating good time credit based on time served "was consistent with the Bureau's understanding of the SRA." *Ibid.* It also was consistent with "the correctional goals of effectively using [good conduct time] as a tool to reward good behavior and providing inmates knowledge of when they could expect to be released from prison." *Ibid.* Thus, the Bureau altered its method of calculating credit because Congress enacted a new statute, 18 U.S.C. 3624 (1988), and the methodology chosen to implement that statute served the policy goals of using credit as an incentive for good behavior and giving prisoners notice of their expected release dates.[16] The Bureau's decision to adopt a time-served methodology was hardly arbitrary or capricious.

2. Even assuming that Section 523.20 is invalid, the court of appeals correctly held that *Program Statement 5880.28* is entitled to deference. The Bureau has extensive expertise in administering credit programs generally; the complex question of how to calculate good time credit is central to the administration of Section 3624;

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[16] Contrary to petitioner's assertion (Br. 47, 51-53), the Bureau exercised interpretive authority in adopting a time-served methodology. See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1167 (2009) (holding that an agency must exercise such authority to receive deference). As the Penn declaration explains, the Bureau concluded that its interpretation was consistent with "[its] understanding of the SRA" and with "the correctional goals of effectively using [good conduct time] as a tool to reward good behavior and providing inmates knowledge of when they could expect to be released from prison." J.A. 154. Thus, the Bureau made a policy choice to harmonize with statutory language and to serve important penological interests that are uniquely within the Bureau's province. Its decision is therefore entitled to deference.

and the Bureau has carefully considered that question over a long period of time. Those factors "all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the [a]gency interpretation here at issue." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). For that reason, this Court held in *Koray* that although "the Bureau's interpretation appear[ed] only in a 'Program Statemen[t],'" which is "an internal agency guideline," it was "still entitled to some deference, * * * since it is a 'permissible construction of the statute.'" 515 U.S. at 61 (quoting *Chevron*, 467 U.S. at 843). Notwithstanding this Court's decision in *Koray*, at the very least *Program Statement 5880.28* is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because it reasonably interprets the statutory language, avoids serious practical difficulties caused by petitioners' contrary interpretation, and represents the Bureau's consistent position. Pet. App. 33-35; *Perez-Olivo*, 394 F.3d at 52 n.6.

As a threshold matter, the text of Section 3624(b)(1) is at the least reasonably read to permit annual calculation of credit on the basis of a prisoner's conduct. The Bureau's interpretation accords with Section 3624(b)(1)'s requirements of annual calculation, good conduct and educational progress, and proration. It also accords with Congress' desire to simplify the computation of credit and its repeal of the pre-SRA regime. Whether Section 3624(b)(1)'s text and history compel the Bureau's interpretation, they certainly render it reasonable. See, *e.g.*, *O'Donald*, 402 F.3d at 174 ("[T]he BOP's interpretation comports with the language of the statute, effectuates the statutory design, establishes a 'fair prorating scheme,' enables inmates to calculate the

time they must serve with reasonable certainty, and prevents certain inmates from earning GCT [credit] for time during which they were not incarcerated.") (quoting *Pacheco-Camacho*, 272 F.3d at 1270).

In addition, petitioners' interpretation presents serious practical difficulties. Although petitioners do not address their proposed implementation, some prisoners have argued that credit should be assessed every 311 days. See *Moreland*, 363 F. Supp. 2d at 887. That approach would mean that every federal prisoner, instead of having a fixed annual review date (*i.e.*, a prisoner whose sentence commences on January 1 has an annual review date of December 31), would have an ever-shifting review date. More important, such an approach assumes that the prisoner will receive the full 54 days of credit, and that together the served time and credited time will amount to one year of the sentence imposed. *Ibid.* If the prisoner does not receive the full 54 days at the end of each 311-day review cycle, then there will be some period at the end of the prisoner's sentence when he is no longer eligible for credit—and thus has no incentive to comply with institutional regulations.

Finally, *Program Statement 5880.28* represents the longstanding position of the Bureau, based on its expertise in this area. See *Walton*, 535 U.S. at 222; *Skidmore*, 323 U.S. at 140. Since 1988, the Bureau has taken the position that Section 3624(b)(1) requires calculation of credit on the basis of time served. Petitioners' interpretation would require recalculation of the sentences of approximately 190,000 federal inmates—approximately 5,000 of whom would be eligible for immediate release. The resulting penological consequences and administrative difficulties would be severe in the Bureau's expert judgment. The interrelated nature of the credit stat-

utes, the vast number of credit determinations that they require, and the consequent need for agency expertise and administrative experience all counsel in favor of deference to the Bureau's reasonable and longstanding interpretation. *Walton*, 535 U.S. at 222, 225.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3624 (2006) provides in pertinent part:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during

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[1] So in original. Probably should be followed by a comma.

the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

* * * * *

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

* * * * *

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

2. Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692-693 (to be codified at 18 U.S.C. 3624(c) (Supp. II 2008)) provides:

Sec. 251. **CLARIFICATION OF AUTHORITY TO PLACE PRISONER IN COMMUNITY CORRECTIONS.**

(a) PRERELEASE CUSTODY.—Section 3624(c) of title 18, United States Code, is amended to read as follows:

"(c) PRERELEASE CUSTODY.—

"(1) IN GENERAL.—The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into

the community. Such conditions may include a community correctional facility.

"(2) HOME CONFINEMENT AUTHORITY.—The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.

"(3) ASSISTANCE.—The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.

"(4) NO LIMITATIONS.—Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621.

"(5) REPORTING—Not later than 1 year after the date of the enactment of the Second Chance Act of 2007 (and every year thereafter), the Director of the Bureau of Prisons shall transmit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report describing the Bureau's utilization of community corrections facilities. Each report under this paragraph shall set forth the number and percentage of Federal prisoners placed in community corrections facilities during the preceding year, the average length of such placements, trends in such utilization, the reasons some prisoners are not placed in community corrections facilities, and any other information that may be useful to the committees in de-

termining if the Bureau is utilizing community corrections facilities in an effective manner.

"(6) ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of the enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—

"(A) conducted in a manner consistent with section 3621(b) of this title;

"(B) determined on an individual basis; and

"(C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

3. 18 U.S.C. 3624(c) (Supp. I 2007) provides:

(c) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run

during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of failure to pay such fines under sections 3611 through 3614 of this title.

4. 18 U.S.C. 3624 (Supp. II 1996) provides in pertinent part:

* * * * *

Release of a prisoner

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the

[1] So in original. Probably should be followed by a comma.

prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law , credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

* * * * *

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

* * * * *

5. 18 U.S.C. 3624 (1994) provides:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal

holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) A prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner's life, shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that during that year, the prisoner has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. A prisoner who is serving a term of imprisonment of more than 1 year for a crime of violence, other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with such institutional disciplinary regulations. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Credit that has not been earned may not later be

granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Credit toward a prisoner's service of sentence shall not be vested unless the prisoner has earned or is making satisfactory progress toward a high school diploma or an equivalent degree.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

(6) A report shall be provided to Congress on an annual basis summarizing the results of this program, including the number of inmate participants, the number successfully completing the program, the number who do not successfully complete the program, and the reasons for failure to successfully complete the program.

6. 18 U.S.C. 3624 (1988) provides:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent

practicable, offer assistance to a prisoner during such pre-release custody.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned

other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

7. 18 U.S.C. 4161 (1982) provides:

Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

8. 18 U.S.C. 4162 (1982) provides:

Industrial good time

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

9. 18 U.S.C. 4165 (1982) provides:

Forfeiture for offense

If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.

10. 28 C.F.R. 523.20 provides:

Good conduct time

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development

(GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

REPLY BRIEF

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In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,

v.

J. E. THOMAS, Warden, FCI Sheridan,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Table of Contents

Page

Table of Authorities v

Introduction 1

A. In Federal Sentencing, "Term Of Imprisonment" Is A Term Of Art Meaning The Sentence Imposed 2

B. The BOP Provides No Basis For An Unprecedented Deviation From Intra-Statutory Consistency Within A Single Sentence 4

C. Throughout Federal Sentencing Statutes, "Term Of Imprisonment" Means The Sentence Imposed, Including The Exceptions Claimed By The BOP 7

D. The History Of The Good Time Credit Statute Unequivocally Demonstrates That Congress Intended That "Term Of Imprisonment" Means The Sentence Imposed, Resulting In Minimum Service Of 85 Percent Of The Term 9

1. The Antecedent Good Time Statutes Established The Norm Of Basing Credits On The Sentence Imposed 10

2. The 85 Percent Rule Furthers The Congressional Goal Of Simplicity 10

3. Congress Articulated Its Intent That Good Time Credits Account For 15 Percent – Not 12.8 Percent – Of The Sentence Imposed 12

E. Any Ambiguity In The Statute Should Be Resolved By Application Of The Rule Of Lenity 14

1. Section 3624(b) Is A Penal Statute Because The Available Good Time Credits Formed The Basis For The Sentencing Table And Determine The Actual Duration Of Incarceration 14

2. The Rule Of Lenity Controls Any Ambiguity, Whether At The First Or Second Step Of *Chevron* Analysis 17

F. The BOP Received No Congressional Delegation To Determine The Amount Of Available Good Time Credits, While Congress's Delegation To The Sentencing Commission Necessarily Incorporated Such A Determination 18

1. The Sentencing Commission's Statutory Mission Included Application Of The Good Time Credit Statute 19

2. Congress Did Not Delegate To The BOP The Authority To Determine The Amount Of Available Good Time Credits 22

G. Under Basic Principles Of Administrative Law, The BOP Should Receive No Deference Because The Agency Acted Based On An Error Of Law, Did Not Properly Promulgate Any Rule, And Implemented An Unreasonably Harsh Limitation On Good Time Credits 23

1. The BOP Conceded That It Failed To Sufficiently Articulate The Basis For The Regulation Governing Good Time Credits 24

2. The BOP Adopted Its Time Served Methodology Based On An Error Of Law 25

3. The BOP Violated § 706 Of The APA When It Failed To Provide An Adequate Rationale For Its Rule 26

4. The Rule Requiring Service Of 87.2 Percent Of The Sentence Imposed Is Unreasonable 26

H. The BOP's Invocation Of "Practical Difficulties" Does Not Provide A Basis For The BOP's Reading Of The Statute 27

1. The Duration Of The Agency's Misinterpretation Is Irrelevant To The Correct Interpretation Of The Statute 27

2. Properly Interpreted, The Statute Can Be Implemented With Relative Ease 28

3. Any Practical Difficulties With Implementing The Statute As Intended By Congress Are Outweighed By The Benefits Of Doing So 31

Conclusion 32

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arrington v. Daniels,
516 F.3d 1106 (9th Cir. 2008) 24

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,
515 U.S. 687 (1995) 17

Bagdonas v. Department of Treasury,
93 F.3d 422 (9th Cir. 1996) 24

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 24

Chevron, U.S.A. Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 14, 17, 18, 23

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 24

Crandon v. United States,
494 U.S. 152 (1990) 18

Diamond v. Chakrabarty,
447 U.S. 303 (1980) 27

Gonzales v. Oregon,
546 U.S. 243 (2006) 18, 22

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 23

Halbert v. Michigan,
545 U.S. 605 (2005) 16

Jama v. ICE,
543 U.S. 335 (2005) 6

Leatherman v. Tarrant County,
507 U.S. 163 (1993) 10

Lopez v. Davis,
531 U.S. 230 (2001) 16, 22, 23

Lynce v. Mathis,
519 U.S. 433 (1997) 27

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 28

Mistretta v. United States,
488 U.S. 361 (1989) 19

Moreland v. Federal Bureau of Prisons,
363 F. Supp. 2d 882 (S.D. Tex. 2005), *rev'd*,
431 F.3d 180 (5th Cir. 2005) 3, 10, 11

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 24

Negusie v. Holder,
129 S. Ct. 1159 (2009) 25

Pacheco-Camacho v. Hood,
272 F.3d 1266 (9th Cir. 2001) 6

Perez-Olivo v. Chavez,
394 F.3d 45 (1st Cir. 2005) 15

Rapanos v. United States,
547 U.S. 715 (2006) 28

Ratzlaf v. United States,
510 U.S. 135 (1994) 4

Reno v. Koray,
515 U.S. 50 (1995) 16

Sash v. Zenk,
428 F.3d 132 (2d Cir. 2005) 15

Sash v. Zenk,
439 F.3d 61 (2d Cir. 2006) 15

Securities and Exchange Commission v. Chenery Corp.,
318 U.S. 80 (1943) 25

United States v. Thompson/Center Arms Co.,
504 U.S. 505 (1992) 17

Whitman v. America Trucking Associations, Inc.,
531 U.S. 457 (2001) 22

Williams v. Dewalt,
351 F. Supp. 2d 412 (D. Md. 2004),
vacated, 2005 WL 4705074 (D. Md.
Dec. 22, 2005) 6, 11, 16

FEDERAL STATUTES, REGULATIONS AND GUIDELINES

5 U.S.C. § 706 ..... 23, 24, 26, 28

18 U.S.C. § 3583(e) 29

18 U.S.C. § 3622 8

18 U.S.C. § 3624(a) 7

18 U.S.C. § 3624(b) ..... *passim*

18 U.S.C. § 3624(c) (repealed 2008) 7

18 U.S.C. § 3624(c) (Supp. II 2008) 8

18 U.S.C. § 3624(d) 8

18 U.S.C. § 4042(a)(1) 22

18 U.S.C. § 4162 (repealed 1984) 10

28 U.S.C. § 994(m) 20

28 U.S.C. § 2243 23

53 Fed. Reg. 10871-01 (Apr. 4, 1988) 22

U.S.S.G. § 1B1.10, comment. (n.4) 29

MISCELLANEOUS

BLACK'S LAW DICTIONARY 1340 (9th ed. 2009) 5

HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) 4

SENATE OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (2000) 4

Douglas A. Berman, *Exploring The Theory, Policy, And Practice Of Fixing Broken Sentencing Guidelines*, 21 Fed. Sent. Rptr. 182 (Feb. 2009) 30

Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission*, May 2009 3

United States Sentencing Commission, Public Hearing, July 29, 2009 30

United States Sentencing Commission, *Fifteen Years Of Guidelines Sentencing*, November 2004 20

Introduction

This case involves the amount of available federal good time credits under 18 U.S.C. § 3624(b). The Bureau of Prisons (BOP) argues the meaning of "term of imprisonment" from the assumption that those credits are based on time served. This puts the cart before the horse. The mechanics of implementing the statute depend on an initial correct determination of what credits Congress intended to make available, which in turn depends on whether "term of imprisonment" means the sentence imposed. Once "term of imprisonment" is determined to be the sentence imposed, the mechanics of implementing the statute easily follow. Throughout the briefing, the BOP claims the petitioners are seeking credit for time not served, which is simply not the case: if "term of imprisonment" means the sentence imposed, the up to 54 days credit plus actual custody each year fully accounts for all the time in the judgment and commitment order.

The BOP's alternative plea for deference is undercut by its assertion that the statute is unambiguous and its Federal Register claim that the good time provisions are "clearly stated." If any deference is due, the Sentencing Commission's prior interpretation, which is the same as the petitioners' interpretation, should govern. Even if deference to the BOP were appropriate, the absence of a rationale for deviating from the Commission's interpretation renders the BOP's rule invalid and unreasonable. At each level of the protocols for statutory interpretation,

this Court's precedent supports construction of "term of imprisonment" as meaning the sentence imposed.

A. In Federal Sentencing, "Term Of Imprisonment" Is A Term Of Art Meaning The Sentence Imposed.

The BOP disregards the Sentencing Reform Act (SRA)'s use of "term of imprisonment" to describe the judicial authority to impose sentence and, instead, resorts to dictionaries to find that "imprisonment" – not "term of imprisonment" – is susceptible to an equally plausible meaning of "time served." Resp. 17. But "imprisonment" is not the phrase being construed: the statute uses "term of imprisonment." Within the SRA, Congress has repeatedly described the judicial action of committing a defendant to federal custody as imposing a "term of imprisonment" for all purposes. Pet. Br. 22. Congress has thus authoritatively defined the relevant phrase in a manner inconsistent and irreconcilable with the BOP's interpretation.

The BOP claims "term of imprisonment" must mean "time served" in the part of § 3624(b) that reads "at the end of each year of the prisoner's term of imprisonment." Resp. 18-19. On the contrary, sentence imposed is the only reasonable meaning of "term of imprisonment" in this context: each year of the term of imprisonment comprises actual incarceration and good time credits. Just as a prisoner completes the term of imprisonment by serving 85 percent of the sentence imposed while earning enough good time to fulfill the remaining 15 percent of the

term, "[t]he same is true with respect to each particular year of [the] sentence; upon serving 311 days of actual time, [the prisoner] earns 54 days credit, which immediately vests and thus wipes out the remainder of that year." *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 882, 893 (S.D. Tex. 2005), *rev'd*, 431 F.3d 180 (5th Cir. 2005). "In other words, this is purely a matter of bookkeeping." *Id.* at 894. The BOP's contrary interpretation ignores the text of the statute in which "each year" is immediately qualified by the adjectival phrase "of the prisoner's term of imprisonment."[1]

The BOP's interpretation also ignores the common usage in standard judgment and commitment orders, which sentence defendants to "imprisonment" for a "term of" a number of months. "Generally, courts use a standard form (AO245B) to impose judgment in a criminal case and provide reasons for that judgment." United States Sentencing Commission, Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission*, May 2009, at 3. The Administrative Office's Form 245B commits the defendant to be imprisoned for a "term of" months under the heading

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[1] In other words, the BOP's claim that the petitioners seek credit for time not served depends on prisoners *not* receiving credit toward the service of their term, beyond time served, at the end of each year of the term of imprisonment.

"imprisonment."[2] Just as "hike" does not mean a football maneuver in the context of a walk outdoors, "term of imprisonment" means sentence imposed in the context of the SRA.

B. The BOP Provides No Basis For An Unprecedented Deviation From Intra-Statutory Consistency Within A Single Sentence.

The BOP concedes "term of imprisonment" unambiguously means the sentence imposed in the first two of its three appearances in the first sentence of § 3624(b). Resp. 23. The BOP can cite no precedent where the same phrase used multiple times in a single sentence is given different meanings. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). There is simply no reason legislative drafters would violate the norms of their craft by using the same phrase in two different ways in such close proximity. *See* HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) § 102(d)(5) at 3 ("Avoid Utraquistic Subterfuges"); *see also* SENATE OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (2000) § 105(a) at 6 ("Consistent Usage"). The BOP also fails to explain why, if "term of

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[2] Administrative Office Form 245B (available at http://www.uscourts.gov/forms/ao245B.pdf). *Accord* AO245B (rev. 3/01); AO245B (rev. 8/96); AO245B (rev. 4/90).

imprisonment" means "time served," Congress would use "time served" to mean "time served" elsewhere in that same sentence. Pet. Br. 24-25.

Instead of directly addressing the third use of "term of imprisonment" in the same sentence, the BOP jumps to the final sentence of the statute, which states that "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." This sentence is completely consistent with "term of imprisonment" as the sentence imposed: the 54 days of potential credit for the last year or portion of the term of imprisonment shall be "prorated." The definition of "prorate" is "[t]o divide, assess, or distribute proportionately." BLACK'S LAW DICTIONARY 1340 (9th ed. 2009). Federal sentences are generally a number of months that only coincidentally might match the twelve months in a year. For any number of months (or days) over an exact year, proration of 54 days of potential credit is simple: the prorated available credits for six months is 27 days; for two months is 9 days; for three months is 18 days; for *n* months is *n*/12 months x 54.[3] For example, Mr. Barber's 320 month sentence is 26 years and eight months. This yields 36 days of potential good time credits for that "portion of the last year" (8/12 x 54 = 36). The amount

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[3] Because the number of days varies from month to month, as well as in leap years, the formula can be reduced to days instead of months. Pet. Br. 32. If the sentence ends in an even twelve months, the full 54 for days is available as the "last year," rather than the alternative – "or" – "portion of the last year," of the term of imprisonment.

of available credit is known from the day the defendant sets foot in prison and can then be "credited" depending on behavior within the last six weeks before the projected release date.[4]

Further, the BOP leaves out the statute's use of the verb "credit" in the last sentence of subsection (b), which skews the relevant phrase. *Compare* Resp. 12 ("The statute requires . . . that the Bureau prorate the final award of credit") *with* 18 U.S.C. § 3624(b) ("credit for the last year or portion of the term of imprisonment shall be prorated *and credited* within the last six weeks of the sentence") (emphasis added). The proration can occur at the outset of incarceration, as the BOP acknowledges, but the crediting occurs in the last six weeks. *See Jama v. ICE*, 543 U.S. 335, 343 (2005) (a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase it immediately follows). Grammatically, the last sentence of § 3624(b) requires proration of the 54 days and crediting that prorated time within six weeks of release.[5]

---

[4] For prisoners under the 1996 amendment, the credit does not vest until release.

[5] The BOP echoes the erroneous assumption in *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001), that "term of imprisonment" in the last sentence refers to all the days of actual custody, Resp. 22, which is inconsistent with the statute's text: "In the case of inmates sentenced to 366 days, the plain reading of subsection [b] would allow the awarding of 54 days for the first year of the sentence imposed and a proration of the portion of the final year, i.e. the single day." *Williams v. Dewalt*, 351 F. Supp. 2d 412, 417 n.5 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. Dec. 22, 2005).

C. Throughout Federal Sentencing Statutes, "Term Of Imprisonment" Means The Sentence Imposed, Including The Exceptions Claimed By The BOP.

The BOP does not dispute that "term of imprisonment" is used hundreds of times in the SRA and the Guidelines to mean the sentence imposed by the court. There is no textual basis for not giving the same phrase the same meaning throughout the federal sentencing statutes. Even as it concedes that "term of imprisonment" unambiguously means the sentence imposed in 18 U.S.C. § 3624(a), the BOP claims that "term of imprisonment" means time served in two other subsections. Resp. 24. Neither provision, linguistically or logically, uses "term of imprisonment" for any other meaning than sentence imposed.

The provisions for pre-release custody in 18 U.S.C. § 3624(c) plainly refer to the sentence imposed, both before and after the Second Chance Act amendment. Prior to 2008, § 3624(c) allowed "a prisoner serving a term of imprisonment" to spend "the last 10 per centum of the term," not to exceed six months, in community corrections. 18 U.S.C. § 3624(c) (repealed 2008). The meaning of this phrase is simple: for sentences greater than 60 months, the maximum time was 6 months in a halfway house or home confinement; for sentences less than 60 months, community corrections was available for no more than 10 percent (*e.g.*, 18 month sentence permitted 1.8 months; 37 month sentence permitted 3.7 months). The amended form of § 3624(c) is even more clear: the BOP "shall, to

the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months)" in community corrections, retaining the six month or 10 percent formula as to home confinement. 18 U.S.C. § 3624(c)(1) and (2) (Supp. II 2008). Nothing in the text of § 3624(c) in any version suggests "term of imprisonment" is anything other than the sentence imposed.

Section 3624(d) also uses "term of imprisonment" to mean the sentence imposed. In providing prisoners with necessary support upon release, the statute states: "Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment," the BOP shall provide clothing, money, and transportation. 18 U.S.C. § 3624(d). "Term of imprisonment" here plainly means the sentence imposed because the sentence only expires, permitting the prisoner's release, when the components of a term of imprisonment – actual incarceration plus good time credits – have accounted for all the time in the judgment and commitment order.[6]

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[6] The BOP also cited 18 U.S.C. § 3622, which does not use "term of imprisonment," and an accompanying executive order that, by stating "during their terms of imprisonment," simply means during the sentence imposed by the court. Resp. 28-29.

D. The History Of The Good Time Credit Statute Unequivocally Demonstrates That Congress Intended That "Term Of Imprisonment" Means The Sentence Imposed, Resulting In Minimum Service Of 85 Percent Of The Term.

As in § 3624(b), the antecedent good time credit statutes based good time credits on the sentence imposed. Pet. Br. 29-31. The BOP uses the same basic structure requiring an initial determination of the amount of available credits, followed by adjustment if the time is lost:

- Under the former statute, "[f]ederal inmates received deductions on the day that they set foot in prison, but could forfeit them during the service of their sentences for the misconduct." Resp. 30.

- Under the present statute, "[w]hen a prisoner enters federal custody, the Bureau calculates his projected release date based on the assumption that he will earn all possible credit." Resp. 19 n.5.

The purposes of § 3624(b), as well as the explicitly expressed intention of legislators, fully support the construction of the statute to provide 15 percent in good time credits, not 12.8 percent, based on the sentence imposed.

1. The Antecedent Good Time Statutes Established The Norm Of Basing Credits On The Sentence Imposed.

The petitioners' interpretation of "term of imprisonment" comports with the basic structure of the predecessor good time statutes. For most of the twentieth century, good conduct time was computed by multiplying the number of months of a sentence as imposed by the court by the appropriate number of days prescribed by the statute. *Moreland*, 363 F. Supp. 2d at 887. The BOP suggests that, rather than following statutory good time predecessor statutes, the construction should be modeled on the defunct industrial good time statute. But that statute included language – absent in § 3624(b) – pinning the credit to each month "of actual employment in an industry or camp." 18 U.S.C. § 4162 (repealed 1984). The use of "actual employment" demonstrates that Congress knows how to set good time against "actual" time and, when it does so, uses appropriate language. *See Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

2. The 85 Percent Rule Furthers The Congressional Goal Of Simplicity.

The 85 percent rule is simple to apply, while the BOP's mathematically complex 87.2 percent rule is not. The statute provides that the prisoner 1) "receive" 2) "credit toward the service of the prisoner's sentence" 3) "beyond the time served" 4) "at the end of each year of the prisoner's term of imprisonment." The statute

leaves to the BOP the determination whether the credit is earned, and the BOP can make the determination regarding behavior at the 311th day, the 365th day, the 380th day, or somewhere in between.[7] But once the determination is made, assuming the prisoner earned all available "credit toward the service of the prisoner's sentence," the year of the term of imprisonment is completed at day 311 of actual time in custody (365-54) of the first year or the 311th day of actual custody after the previous year's computation.[8]

The BOP's complaints about computation are simply a matter of failing to implement the bookkeeping required by the statute's plain meaning. An annual adjustment for good time credit – exactly what the statute calls for – resolves the BOP's practical complaints. The BOP's adherence to an anniversary date based on the date the sentence commenced, with no adjustment for credits the defendant should "receive" "at the end of each year of

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[7] As the *Moreland* district court vividly illustrated, the phrase "at the end" does not mean "after." 363 F. Supp. 2d at 886-87.

[8] "The use of the phrase 'beyond time served' dictates that prisoners should receive 54 days credit against their term of imprisonment based on 311 days in custody, plus 54 days of good conduct credit 'beyond time served,' equaling 365 days – a year of the sentence imposed." *Williams*, 351 F. Supp. 2d at 417.

the term of imprisonment," defies the statutory text.[9] Further, the BOP's algorithm results in absurdities. For example, for a sentence with 294 days remaining, "the [good conduct time] formula does not produce a result that will allow the number of days actually served plus the [good conduct time] to equal 294 days." JA-98. The BOP has it backwards: the 87.2 percent rule presents difficulties in application, and the 85 percent rule makes sense and is easy to apply.

3. Congress Articulated Its Intent That Good Time Credits Account For 15 Percent – Not 12.8 Percent – Of The Sentence Imposed.

There is no record support for the BOP's claims regarding the legislative history. Resp. 35-36. First, the Senate Report – in addition to individual Senators – articulated the good time credits as a percentage of the "term of imprisonment." Pet. Br. 34. Second, the words of the legislators explicitly referred to minimum service of 85 percent of the sentence pronounced by the judge:

> [I]f a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time – 8.5 years, which is what the law mandates. You

---

[9] Under the BOP system, the prisoner does not "receive" credit at the end of each year of the term of imprisonment, while the projected release date remains the same unless, due to failure to earn credits, the projected release date is moved back. Resp. 19 n.5.

> can get up to 1.5 years in good time credits, but that is all.

Pet. Br. 35. Third, Congress in its entirety acted on the assumption that federal prisoners receive up to 15 percent credits in seeking to align the federal and state standards, requiring service of "not less than 85% of the sentence imposed." Pet. Br. 35-36. The legislative history of § 3624(b) demonstrates that Congress meant what it said in establishing 54 days of good time credits for each year of the "term of imprisonment."

One further point regarding the legislative history: the BOP asserts the petitioners "cannot possibly claim to have lacked fair warning of the manner in which the Bureau calculates good time credit." Resp. 44. Of course they can. If legislators, including a co-author of the bill, were unaware of the BOP's idiosyncratic method of good time computation, a decade after § 3624(b)'s enactment, prisoners certainly did not know. The BOP never – in any regulation or program statement – spelled out that its method results in fewer available credits. Had fair notice been given, prisoners, families of prisoners, and advocates for defendants undoubtedly would have commented. The lack of fair notice is definitively established by the BOP's admission that the agency received no comments when its regulation was promulgated.

E. Any Ambiguity In The Statute Should Be Resolved By Application Of The Rule Of Lenity.

If there is ambiguity in Congress's use of "term of imprisonment" in § 3624(b), the Court should first consider the rule of lenity, which resolves any residual ambiguity and trumps agency deference.[10]

1. Section 3624(b) Is A Penal Statute Because The Available Good Time Credits Formed The Basis For The Sentencing Table And Determine The Actual Duration Of Incarceration.

The BOP's claim that the rule of lenity does not apply to § 3624(b) depends on Circuit rulings predicated on insufficient information. Resp. 41-44.[11] The courts were not informed that the Sentencing Commission had incorporated the 85 percent rule into the Sentencing Table utilized by sentencing judges in determining the length of sentences. The courts also assumed, incorrectly, that the BOP properly promulgated the regulation to which they deferred.

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[10] The BOP's summary of *Chevron* is incomplete. Resp. 14, given the rule of lenity, delegation, and promulgation issues in this case.

[11] Contrary to the BOP's suggestion, only three courts found that § 3624(b) was not the type of statute to which the rule of lenity applies, while the remainder found that the rule of lenity applied but was trumped by *Chevron* deference. *Compare* Resp. 41 *with* Pet. Br. 14-15 *and* NACDL Pet. *Amicus* 6-7.

Without citation, the First Circuit initially asserted that the good time credit statute "is not, strictly speaking, a 'criminal' statute, and thus we do not believe the rule of lenity would apply." *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005). Following *Perez-Olivo*, the Second Circuit held that, "[b]ecause § 3624(b) is not a criminal statute, the rule of lenity is not relevant to this case." *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005). On petition for rehearing, the petitioner only invoked this Court's *ex post facto* rulings to argue that the good time credit statute is penal and therefore covered by the rule of lenity. In response, the court asserted that the notice function of the *ex post facto* prohibition was accomplished by the promulgation of the good time credit regulation. *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006).

With fuller factual development and briefing, the reasoning underlying *Sash* no longer supports its conclusion. Pet. Br. 37-40; NACDL *Amicus* 14-16. First, the Sentencing Commission's incorporation of the 85 percent rule into the construction of the Sentencing Table eliminates any distinction between sentencing and prison administration because the sentence imposed is premised on the assumption of 15 percent available good time credits. Second, the assumption of an APA compliant regulation is not valid where the record establishes that the BOP violated the APA in promulgating the rule and never provided notice regarding the differential in available

credits.[12] Third, in *Sash*, the briefing, and therefore the court's decision, involved only *ex post facto* claims, not due process liberty, habeas corpus, and former jeopardy precedents of this Court that also treat good time credit statutes as penal.

This Court's precedents establish that § 3624(b) is penal, or criminal, for the purposes of the rule of lenity because the amount of available good time credit is essential to determining actual time of physical custody. Pet. Br. 37-40. Contrary to the BOP's suggestion, the Court's decisions in *Reno v. Koray*, 515 U.S. 50 (1995), and *Lopez v. Davis*, 531 U.S. 230 (2001), did not state that statutes regarding the administration of sentences are not penal statutes. Resp. 42-43. The Court in *Koray* concluded that the rule of lenity did not apply to the jail credit statute and "related sentencing provisions" because the statute was not ambiguous. 515 U.S. at 58, 65. The Court found the statute in *Lopez* unambiguously permitted the categorical exercise of discretion. 531 U.S. at 244 n.7. The question of available good time credit – from a statute in the Title 18 subchapter entitled "Imprisonment" – involves all the functions served by the rule of lenity: protecting against violation of the

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[12] The lack of notice is not only apparent from Congress's 85 percent assumption, "courts and practitioners have commonly understood that federal inmates are eligible for a reduction of up to 15% of their sentence, through the earning of good time credits." *Williams*, 351 F. Supp. 2d at 419. *See also Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (noting difficulties prisoners confront in navigating legal issues).

separation of powers, avoiding unwarranted loss of liberty, and assuring that statutes provide unambiguous notice regarding the extent of incarceration resulting from the imposition of a term of imprisonment.

2. The Rule Of Lenity Controls Any Ambiguity, Whether At The First Or Second Step Of Chevron *Analysis.*

The BOP ignores footnote 9 of *Chevron*, which requires application of substantive rules of statutory construction such as lenity at *Chevron*'s first step. Pet. Br. 40-42. Instead, the BOP relies on a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), that addressed a supplemental argument claiming the rule of lenity applied to "facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." Resp. 44. The *Sweet Home* footnote distinguished facial challenges from the normal application of the rule of lenity to ambiguous criminal statutes, citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 & n.9 (1992).

Unlike the present case, the Secretary in *Sweet Home* acted pursuant to a specific delegation from Congress and provided full and fair notice with a properly promulgated rule. Further, the *Sweet Home* regulation filled a statutory gap, while the phrase at issue in the present case purportedly has two meanings – with one meaning resulting in a harsher

sentence than the other. Thus, there is no gap left for the agency to fill. The as-applied challenge in the present case directly addresses actual incarceration and no valid regulation. This Court's precedent applying the substantive rule of lenity at the first step of *Chevron* controls.

At the second step of *Chevron*, the BOP claims it does not "act in a prosecutorial role in administering good time credit." Resp. 42 n.12. The reasoning of the *Crandon* concurrence, which was adopted at least in part in *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (citing *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring)), is based on separation of powers concerns that are as common to Justice Department agencies as to prosecutors themselves. Pet. Br. 42-46. This case starkly illustrates the prescience of the warning that giving persuasive effect to the Justice Department's statutory construction would replace "the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

F. The BOP Received No Congressional Delegation To Determine The Amount Of Available Good Time Credits, While Congress's Delegation To The Sentencing Commission Necessarily Incorporated Such A Determination.

The BOP cites no statutory language authorizing it to determine the amount of available good time credits, relying only on the fiction of implied delegation

as an adjunct to its ministerial duties. The Sentencing Commission, on the other hand, received authorization to implement policy in the detailed congressional instructions underlying the creation of the Sentencing Table.

1. The Sentencing Commission's Statutory Mission Included Application Of The Good Time Credit Statute.

The BOP's position on the Sentencing Commission is based on legal and factual errors. Resp. 39-40. The legal argument relies on a citation that purports to demonstrate recognition of the BOP's post-SRA authority, but in fact only describes the pre-SRA regime. In *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989), this Court described the pre-SRA parole system: "[W]ith the advent of parole, Congress moved toward a 'three-way sharing' of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge." The BOP quotes a fragment of this passage as suggesting that *Mistretta* recognized the BOP's "distinct" role from the post-SRA Commission. Resp. 40. But the next sentence in *Mistretta* clarifies that the reference to Executive Branch personnel was to the pre-SRA Parole Board: aside from the roles of Congress and Judiciary, "the Executive Branch's parole official eventually determined the actual duration of imprisonment." 488 U.S. at 365. With the SRA, parole was abolished. *Mistretta* directly addressed the delegation of the SRA's implementation

to the Sentencing Commission, including calibration of the Sentencing Table under 28 U.S.C. § 994(m). Pet. Br. 47-51.

The BOP's legal error is compounded by factual errors. First, the BOP claims that the Commission's report documenting the calibration of the Sentencing Table using the 85 percent rule is "merely 'an estimate' that represented" "an amalgam of decision making processes." Resp. 41 n.10. But the citations do not support the quotations. The Commission's supplemental report establishes that the *baseline amount of actual custody*, not the *amount of good time credits*, was an "estimate" and based on the "amalgam" of decisions. JA-144 n.64. The report clearly describes the good time credits available as requiring minimum service of 85 percent of the sentence imposed. JA-146; *see also* JA-3, No. 24, Appx. C, at 8-20.

Second, the BOP cites to Appendix D of the Commission's fifteen year assessment that includes a description of the BOP's 13 percent "good time discount," Resp. 40, without mentioning that, in the substantive text of that same document, the Commission cites to § 3624(b) for the following: "In the SRA, Congress mandated that all offenders would serve at least *85 percent of the sentence imposed by the sentencing judge*, with a maximum reduction of about 15 percent as a reward for good behavior while in prison." United States Sentencing Commission, *Fifteen Years Of Guidelines Sentencing*, November 2004, at 15 (emphasis added). Contrary to the BOP's claim, the Commission recognized that, regardless of the BOP

practice, the statutory language of the SRA contemplates minimum service of the sentence imposed at 85 percent, not 87.2 percent.

Third, the BOP errs regarding the Commission's 1990 amendment to the introductory commentary regarding honesty in sentencing. The BOP asserts that the Commission's statement that "sentences" are reduced by approximately 15 percent was "a general estimate of the Bureau's practices, not an authoritative interpretation of Section 3624." Resp. 41 n.10. First, the phrase from the commentary is that "the sentence imposed by the court" is reduced by approximately 15 percent, not just "sentences." Pet. Br. 7. Second, 14.8 percent is a much closer approximation to 15 percent, than the 12.8 percent or 13 percent the BOP offers. Third, the Commission would be stretching the far reaches of irony to end a sentence that begins "[h]onesty is easy to achieve" with a 2.2 percent variance in the actual time defendants serve.

The Sentencing Commission based the most fundamental icon of the Guidelines regime – the Sentencing Table – on the assumption of the availability of 15 percent good time credit toward the sentence imposed. No amendment in compliance with the SRA has negated the Commission's approach. Given the express delegation of the SRA's implementation to the Sentencing Commission, any available discretion in interpreting the amount of available good time credits belongs to the Commission.

2. Congress Did Not Delegate To The BOP The Authority To Determine The Amount Of Available Good Time Credits.

Authorized delegations are not hidden in legislation. *Gonzales*, 546 U.S. at 267 (Congress does not delegate by hiding "elephants in mouseholes") (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The BOP is unable to point to any statutory delegation of authority to set the amount of available good time credits, instead relying on an implicit delegation. The BOP, under the direction of the Attorney General, has "charge of the management and regulation" of all federal prisons. 18 U.S.C. § 4042(a)(1). Congress delegated to the BOP only the determination whether a prisoner should receive good time credits, not the authority to determine how much credit is available. *See* Delegation of Authority, 53 Fed. Reg. 10871-01 (Apr. 4, 1988) (referring to the BOP's preexisting "general authority to implement disciplinary regulations"). In *Gonzales*, this Court held that deference is warranted only where the subject matter of agency action is clearly within the scope of delegated authority and where the agency acted in the exercise of that authority. 546 U.S. at 258. Neither predicate exists here. It is pure fiction that Congress decided to let the BOP determine whether the minimum actual custody for a sentence should be 85 percent or 87.2 percent of the term of imprisonment.

Unlike *Lopez*, Congress did not leave a statutory gap to be filled. Resp. 38-39. In *Lopez*, the Court found congressional delegation to narrow the class of

prisoners eligible for certain programming. 531 U.S. at 244. In contrast, the question in this case involves the kind of "pure question of statutory construction for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Further, the Court specifically left open in *Lopez* the procedural validity of BOP rules, which is at issue here. 531 U.S. at 244 n.6. Unlike the present case, *Lopez* involved discretionary action within the scope of an unambiguous statute.

G. Under Basic Principles Of Administrative Law, The BOP Should Receive No Deference Because The Agency Acted Based On An Error Of Law, Did Not Properly Promulgate Any Rule, And Implemented An Unreasonably Harsh Limitation On Good Time Credits.

The BOP seeks *Chevron* deference despite its concession below that, under § 706 of the APA, the agency failed to sufficiently articulate the basis for its "time served" regulation. Resp. 46. Contrary to the BOP's assertion that the Ninth Circuit "erred" in accepting the concession, Resp. 13, the Court should find the concession was proper. Regardless of the concession, however, under well-established administrative law, the BOP interpretation should receive no deference, leaving the Commission's 85 percent standard as the default rule. *See also* 28 U.S.C. § 2243 (the Court shall dispose of habeas petitions "as law and justice require").

1. The BOP Conceded That It Failed To Sufficiently Articulate The Basis For The Regulation Governing Good Time Credits.

In the lower court, the BOP submitted a letter before oral argument citing *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), in which the Ninth Circuit held "the Bureau of Prisons violated the [APA] when it failed to sufficiently articulate the basis for a regulation . . . ." JA-8-20. The BOP acknowledged, under *Arrington*, "the regulation governing good conduct time credits suffers the same procedural infirmity . . . ." *Id.* Based on the BOP's concession that it violated § 706(2)(A) of the APA by failing to articulate a rational basis for its decision, the court found the regulation invalid, then addressed the remedy. JA-38, 46.

Throughout its response brief, the BOP cites to the declaration of BOP attorney Harlan Penn as providing a rationale for the BOP's rules. However, courts do not rely on *post hoc* litigation affidavits in reviewing agency action. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49-50 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). The Court should hold the BOP to its concession. No exception is warranted on this record. In any event, when considered in the light of the administrative record, *Bagdonas v. Dept. of Treasury*, 93 F.3d 422, 427 (9th Cir. 1996) (citing *Overton Park*, 401 U.S. at 420), the declaration does not salvage the BOP's violation of the

APA, which the petitioners established in three different ways. Pet. Br. 46-58. Indeed, the district court agreed with the petitioners that the declaration did not establish exercise of discretion. JA-163-66 (further discovery and hearing unnecessary given that the declaration was consistent with the administrative record demonstrating no discretion was exercised).

2. The BOP Adopted Its Time Served Methodology Based On An Error Of Law.

The BOP has long argued that § 3624(b) is unambiguous. Because the BOP followed its mistaken view of the law, the agency necessarily did not exercise discretion in choosing between two viable meanings. Assuming the phrase "term of imprisonment" is ambiguous, the BOP acted based on a mistake of law that forecloses deference under the reasoning of *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943). Pet. Br. 52-53. The BOP's suggestion that it chose between two possible meanings is belied by its assertion in the Federal Register that the time-served method was "clearly stated by statute." JA-63. Because of its legal error in failing to recognize two available interpretations, the BOP deserves no deference under *Chenery* and *Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009). Pet. Br. 51-53.

3. The BOP Violated § 706 Of The APA When It Failed To Provide An Adequate Rationale For Its Rule.

The administrative record is barren, failing to provide any rationale for a harsher rule and failing to consider the Sentencing Commission's use of the 85 percent rule. Pet. Br. 53-56. The BOP relies solely on the Penn declaration's assertion that the time served method was consistent with "the correctional goals of effectively using [good conduct time] as a tool to reward good behavior and providing inmates knowledge of when they could be expected to be released from prison." Resp. 49 n. 16. Those goals are accomplished by any good time credit system. Indeed, they are better achieved based on the 85 percent rule because 1) the full available incentive for good behavior is provided, and 2) any inmate or sentencing judge just needs to multiply the sentence by .85, or subtract 15 percent from the sentence, to know when the earliest release from prison can be expected.

4. The Rule Requiring Service Of 87.2 Percent Of The Sentence Imposed Is Unreasonable.

The BOP's mission is served when "inmates earn as much good time as is allowed under the law." NACDL *Amicus* at 31 (quoting the Director of the BOP). The BOP's interpretation is unreasonable because the agency has never explained why, if two options exist, the harsher option should apply and why, given the calibration of the Sentencing Table using the 85 percent rule, the BOP should not give

credit at the same rate. Even in the briefing, even outside the administrative record, no explanation is given beyond describing the purposes of good time credit statutes in general and mechanical problems that presuppose the time served construction.[13] The BOP's rule is irrationally harsh and unreasonably inconsistent with the Sentencing Commission's previous implementation of the statute.

H. The BOP's Invocation Of "Practical Difficulties" Does Not Provide A Basis For The BOP's Reading Of The Statute.

The BOP invokes "practical difficulties" along with the passage of time as reasons to defer to informal agency action. Resp. 61-62. Such considerations do not warrant continued over-incarceration of 36,000 cumulative years at the cost of almost $1 billion that Congress did not clearly authorize.

1. The Duration Of The Agency's Misinterpretation Is Irrelevant To The Correct Interpretation Of The Statute.

"[O]nce Congress has spoken it is 'the province and duty of the judicial department to say what the law is.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980)

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[13] The BOP suggests a rationale might be provided in an interim rule yet to be unveiled. Resp. 47 n.14. Such *post hoc* justifications in response to litigation do not warrant deference, *supra* at 21, and any new rule should not apply retroactively. *See Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997).

(quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The construction of statutes is the bread and butter work of this Court, as Congress agreed in 5 U.S.C. § 706 (providing that courts "shall decide all questions of law [and] interpret constitutional and statutory provisions"). As entrenched administrative error in *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality), did not warrant "a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review," the BOP's long-standing misinterpretation of § 3624(b) does not provide a basis for ruling against the petitioners. The primacy of the text and the rules of construction are especially appropriate where in the administrative record the BOP never asserted that the good time credit statute was ambiguous; never purported to make a decision between competing methods of calculating available good time credits; and never advised anyone that the method adopted by the BOP resulted in seven fewer days of available good time credits each year.

2. Properly Interpreted, The Statute Can Be Implemented With Relative Ease.

Although irrelevant to the interpretation of the statute, the BOP raises concerns regarding the difficulties of recalculating the sentences of "approximately 190,000 federal inmates – approximately 5,000 of whom would be eligible for immediate release." Resp. 51. The BOP can follow the law with relative ease because the statutory correction involves a simple computerized math fix. Each prison

has staff involved with prisoners' release plans, so the number of prisoners in each administrative unit is relatively small, especially when prioritized based on proximity to release. To assure no incorrect releases, the computerized recalculation is easily confirmed manually by multiplying the years of the term of imprisonment by seven days and assuring the new projected release date is not adjusted by more than the resulting number of days. The time periods are relatively short individually: 35 days for a five-year sentence; 70 days for a ten-year sentence; 140 days for a twenty-year sentence.

For the approximately 26.7 percent of the prison population who are aliens, the change in calculation merely accelerates referral to immigration authorities for removal. Likewise, transfer alone is at issue for those with state detainers. For most of the remaining prisoners, the BOP has placed or will place them in community corrections including home detention. The effect on probation offices will be diffused over 94 districts in the United States, and, as with crack cocaine retroactivity over-incarceration, case loads can be mitigated by early terminations for those already on supervised release.[14]

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[14] Sentencing Commission commentary recognized the availability of early termination of supervised release under 18 U.S.C. § 3583(e) for potential beneficiaries of retroactive Guidelines amendments who already completed terms of imprisonment. U.S.S.G. § 1B1.10, comment. (n.4(B)). If the petitioners prevail, district courts would have the same authority "in the interests of justice" to invoke § 3583(e) to reduce supervised release terms for those already released.

Recent experience with the retroactive crack cocaine amendment demonstrates that the BOP's concerns are exaggerated and that practical implementation can be accomplished with relative ease. In considering crack retroactivity, the Justice Department and the defense bar disagreed about the practical difficulties where each crack retroactivity case would involve review of the individual underlying case, rather than a simple math fix. "Despite 'sky-might-fall' concerns expressed by the Department of Justice," "the federal criminal justice system appears to have handled smoothly and effectively the various administrative challenges posed by making retroactive a Guideline fix that impacted nearly 10 percent of the entire federal prison population." Douglas A. Berman, *Exploring The Theory, Policy, And Practice Of Fixing Broken Sentencing Guidelines*, 21 Fed. Sent. Rptr. 182, 185 (Feb. 2009).[15] The BOP is fully capable of implementing in good faith the properly construed good time credit statute.

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[15] *See also* United States Sentencing Commission, Public Hearing, July 29, 2009, statement of Vice Chair Castillo, at 204 ("I think [the implementation of retroactive crack amendment] is one of the greatest untold stories of federal sentencing. 20,000 individuals having their sentences reduced, and over 5,000 individuals have actually been released with very little recidivism problems . . . .").

3. Any Practical Difficulties With Implementing The Statute As Intended By Congress Are Outweighed By The Benefits Of Doing So.

The federal prisoner population constantly increases beyond the resources available to the BOP, resulting in overcrowded prisons, program cuts, and danger to guards and inmates alike. Federal prisons are currently at 137 percent of capacity. Rehabilitative programs such as the successful UNICOR work training program and the federal boot camp have been cut back or terminated entirely. The increase in prison population is accompanied by increased violence as the number of corrections officers trails the increase in inmates. Correct interpretation of the good time statute would reduce the general prison population and would allow increased utilization of community resources through earlier access to Second Chance Act programs.

The effect on prisoners is profound. While those working in the criminal justice system can become inured to days, months, and years of incarceration, each individual prisoner feels every extra day behind bars, away from family and friends, unable to pursue employment and life's passions. Each day of separation can be deeply felt by fathers, mothers, siblings, and especially children. The value our society and Constitution place on human freedom is betrayed by a rule that allows the administrative difficulty of correcting over-incarceration to justify more over-incarceration.

Lastly, the cost to the taxpayers in a time of scarce economic resources is tremendous. The non-capital costs of incarceration average about $25,894 a year. With the average term of imprisonment for eligible prisoners of about 9.5 years, at seven extra days for 195,435 prisoners, the cost to taxpayers is about $96.2 million per year. This cost only increases with every year that the misinterpretation of the statute continues, multiplying the distortion of the BOP budget and expense to taxpayers for incarceration Congress never clearly authorized.

Conclusion

This Court's precedent on statutory construction and protection of liberty requires construction of "term of imprisonment" to mean the sentence imposed. The mechanics of implementing the statute based on 54 days for each year of the "term of imprisonment" is easy because "each year" means actual custody plus good time credits. Any statutory ambiguity should be resolved in favor of lenity and the Sentencing Commission's assumption of 15 percent credits in calibrating the Sentencing Table, not the BOP's faulty rule favoring irrational severity. Not only is the 85 percent rule supported by the language and the context of the statute, reversal of the lower court furthers the strong policies favoring human freedom and protection of the public fisc.

Respectfully submitted this 15th day of March, 2010.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,

Petitioner,

v.

J.E. THOMAS, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN THE UNITED STATES, FAMILIES AGAINST MANDATORY MINIMUMS, THE AMERICAN CIVIL LIBERTIES UNION, AND LAW DEANS AND FACULTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE TEXT OF 18 U.S.C. § 3624(B)(1) UNAMBIGUOUSLY REQUIRES GOOD TIME CREDITS TO BE AWARDED FOR EACH YEAR OF THE SENTENCE IMPOSED, NOT THE TIME SERVED	5
A. Petitioner's Reading Supports An Interpretation Under Which Each Word Of 18 U.S.C. § 3624 Can Be Given Its Ordinary and Natural Meaning	6
B. BOP's Convoluted Reading Of The Statute Is Impermissible	10
II. IF THE STATUTE IS AMBIGUOUS, LENITY REQUIRES THE STATUTE BE CONSTRUED IN PETITIONERS' FAVOR AND PRECLUDES DEFERENCE TO BOP'S INTERPRETATION	14
A. Section 3624(b) Is a Penal Statute To Which the Rule of Lenity Applies	14
B. The Rule of Lenity Requires Resolving Ambiguity in Favor of the Defendant	16
C. Doctrines of Administrative Deference Are Incompatible With The Rule of Lenity	18

TABLE OF CONTENTS—continued

Page

III. CORRECTLY CALCULATING GTC WILL CONSERVE FEDERAL RESOURCES, EASE PRISON OVERCROWDING, AND PROTECT PRISONERS' LIBERTY INTERESTS 29

CONCLUSION 33

APPENDIX, List of Federal Public and Community Defenders Joining as *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 13
Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 17, 23
Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932) 6
Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) 28
Bifulco v. *United States*, 447 U.S. 381 (1980) 14, 18
Brown v. *Gardner*, 513 U.S. 115 (1994) 6, 13
Busic v. *United States*, 446 U.S. 398 (1980) 19
Chevron U.S.A., Inc. v. *NRDC*, 467 U.S. 837 ..... 13, 18, 19, 21
Christensen v. *Harris County*, 529 U.S. 576 (2000) 27
Cleveland v. *United States*, 531 U.S. 12 (2000) 16
Crandon v. *United States*, 494 U.S. 152 (1990) 26
Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 20, 21
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 21
Gen. Dynamics Land Sys. v. *Cline*, 540 U.S. 581 (2004) 22
Glover v. *United States*, 531 U.S. 198 (2000) 29
Gonzales v. *Oregon*, 546 U.S. 243 (2006) 28
INS v. *St. Cyr*, 533 U.S. 289 (2001) 20, 21

TABLE OF AUTHORITIES—continued

Page

Krugh v. *Miehle Co.*, 503 F.2d 121 (6th Cir. 1974) 15
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 5
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 10, 20
Lopez v. *Davis*, 531 U.S. 230 (2001) 25
Lynce v. *Mathis*, 519 U.S. 433 (1997) 15
Mistretta v. *United States*, 488 U.S. 361, 396 (1989) 28
Moreland v. *Federal Bureau of* Prisons, 363 F. Supp. 2d 882 (S.D. Tex. 2005), *reversed by* 431 F.3d 180 (5th Cir. 2005).. 8
Mourning v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973) 15
Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 19, 20
Reno v. *Koray*, 515 U.S. 50 (1995) 26
Rhodes v. *Chapman*, 452 U.S. 337 (1981)... 31
Skidmore v. *Swift*, 323 U.S. 134 (1944) 22, 27
Solid Waste Agency v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) 21, 22, 24
Sorenson v. *Secretary of Treasury*, 475 U.S. 851 (1986) 6, 13
United States v. *Aguilar*, 515 U.S. 593 (1995) 17
United States v. *Bass*, 404 U.S. 336 (1971) 17, 21, 24
United States v. *Granderson*, 511 U.S. 39 (1994) 14, 16
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United States v. *Mead Corp.*, 533 U.S. 218 (2001) 18, 27

TABLE OF AUTHORITIES—continued

Page

United States v. *R.L.C.*, 503 U.S. 291 (1992) 14, 16, 18, 23
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United States v. *Wiltberger*, 18 U.S. 76 (1820) 16, 17, 18
Weaver v. *Graham*, 450 U.S. 24 (1981) 15, 24
Whalen v. *United States*, 445 U.S. 684 (1980) 17, 18, 27
Wyeth v. *Levine*, 129 S. Ct. 1187 (2009) 21
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 4, 32

STATUTES AND CODE

18 U.S.C. § 3624 ..... *passim*
18 U.S.C. § 4001(b)(1) 25
18 U.S.C. § 4007 30
18 U.S.C. § 4042(a)(1) 25
28 C.F.R. § 523.20 (2008) 10

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Page

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus curiae, the National Association of Federal Defenders, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Amici curiae, Federal Public and Community Defenders in the United States (not including the Federal Defender representing the petitioner in this matter), have offices in nearly all federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. These *amici* are listed in the Appendix hereto.

Amicus curiae, Families Against Mandatory Minimums ("FAMM"), is a national, nonprofit, nonpartisan organization of over 24,500 members founded in 1991. FAMM's primary mission is to promote fair and proportionate sentencing policies

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

and to challenge inflexible and excessive penalties required by mandatory-sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through *amicus* filings in important cases.

Amicus curiae, the American Civil Liberties Union ("ACLU"), is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation.

Amici curiae, Erwin Chemerinsky, Dean, University of California—Irvine School of Law; Nora Demleitner, Dean and Professor, Hofstra University School of Law; Margaret L. Paris, Dean, University of Oregon School of Law; David N. Yellen, Dean, Loyola University Chicago School of Law; Janet Ainsworth, Professor, Seattle University School of Law; Laura I Appleman. Assistant Professor, Willamette University College of Law; Tamar R. Birckhead, Assistant Professor, University of North Carolina School of Law; John M. Burkoff, Professor, University of Pittsburgh School of Law; Gabriel J. Chin, Professor, University of Arizona James E. Rogers College of Law; Donna Coker, Professor, University of

Miami School of Law; J. Herbie DiFonzo, Professor, Hofstra University School of Law; Tigran W. Eldred, Visiting Clinical Professor, Hofstra University School of Law; Richard Klein, Professor, Touro Law School; Arthur B. LaFrance, Visiting Professor, University of Arizona James E. Rogers College of Law; Wayne A. Logan, Professor and Associate Dean, Florida State University College of Law; Erik Luna, Professor, Washington and Lee University School of Law; Susan F. Mandiberg, Professor, Lewis & Clark Law School; Stephen A. Saltzburg, Professor, The George Washington University Law School; Jeffrey J. Pokorak, Professor and Director of Clinical Programs, Suffolk University Law School; and Charles D. Weisselberg, Professor, University of California—Berkeley School of Law, have longstanding commitments to criminal justice issues, including those related to criminal defendants' periods of incarceration.

Amici appear in support of Petitioners because the decision below improperly permits incarceration of defendants convicted in federal courts for periods longer than Congress intended. 18 U.S.C. § 3624(b)(1) unambiguously requires the Federal Bureau of Prisons ("BOP") to award federal prisoners a maximum of 54 days of good time credit ("GTC") for each year of the sentence imposed, and BOP's policy of awarding less than this full measure of credits carries enormous human, social, and financial costs. As advocates, practitioners, and scholars working in the field of criminal law and sentencing, *amici* and their clients urge the Court to correct the Ninth Circuit's error of deferring to BOP's construction. Such deference is unwarranted because the words of the statute are unambiguous and, in all events, is incompatible with the time-honored rule of lenity,

which governs the resolution of any textual ambiguity that might be found in this case.

SUMMARY OF ARGUMENT

This Court has long held that freedom from unlawful imprisonment lies at the heart of liberty. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001). Yet the Bureau of Prisons has improperly interpreted the statute governing the award of credits for good behavior so as to deprive hundreds of thousands of federal prisoners of the full measure of such credits, thereby unlawfully delaying their release dates, in many cases by weeks or months. The GTC statute's plain language supports a straightforward methodology for calculating prisoners' release dates, providing that a prisoner may earn 54 days of credit per year of the sentence imposed. Thus, in a sentence of twelve months and one day, a prisoner could earn 54 days' credit by serving 312 days. By contrast, BOP has imposed an awkward reading that defines the provision's key phrase differently each time it appears within the very same sentence. The resulting construction necessitates a pages-long, obscure formula that, by its eighth and final step, results in the awarding of only a maximum 47 days of GTC per prisoner per year, rather than the 54 days the statute requires.

Although the statute's plain language and legislative history foreclose any reading other than that advocated by Petitioners, even if there were any statutory ambiguity, the rule of lenity would require that any such ambiguity be construed in the prisoners' favor, given that the statute at issue determines the length of sentences and therefore is penal. Thus, there can be no remaining ambiguity for BOP to resolve, and therefore no deference to its

views is warranted. Moreover, BOP has already conceded that it did not properly promulgate its interpretation of the GTC statute, so *Chevron*-type deference is inapplicable in any event. Nor does BOP's interpretation merit *Skidmore*-type respect, for the agency never intended to construe any ambiguities in the law, and thus its countertextual understanding of the statute fails to satisfy even the most elementary requirements for affording deference to an agency decision.

In this time of fiscal stress, continually-expanding prison populations and resulting overcrowding, the Court should effectuate the GTC policy Congress prescribed and which BOP has improperly disregarded. Doing so will not only serve substantially to conserve federal resources and to improve conditions for those still in prison, but it will also restore, according to the schedule Congress intended, the liberty of prisoners who have served their time and behaved well during incarceration.

ARGUMENT

I. THE TEXT OF 18 U.S.C. § 3624(B)(1) UNAMBIGUOUSLY REQUIRES GOOD TIME CREDITS TO BE AWARDED FOR EACH YEAR OF THE SENTENCE IMPOSED, NOT THE TIME SERVED.

At issue in these cases is the proper construction of the language in 18 U.S.C. § 3624(b)(1). "It is axiomatic that '[the] starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)) (alteration in original). Here, because the meaning of the statute's language is

unambiguous, the language of § 3624(b) "is also where the inquiry should end." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)) (internal quotation marks omitted). That presumption is "surely at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

BOP ignores this presumption and interprets the phrase "term of imprisonment" to have multiple meanings within the same statute and, indeed, the same sentence. Although this presumption may be overcome when context so requires, see *Atlantic Cleaners*, 286 U.S. at 433, the context of § 3624 in no way requires BOP's unnatural reading. To the contrary, when "term of imprisonment" is read to have the same meaning throughout § 3624, it is possible to apply the statute in a straightforward manner that gives effect to each of its words—with no linguistic gymnastics required.

A. Petitioner's Reading Supports An Interpretation Under Which Each Word Of 18 U.S.C. § 3624 Can Be Given Its Ordinary and Natural Meaning.

Petitioners' understanding of 18 U.S.C. § 3624—under which 54 days of GTC are awarded for each year of the sentence imposed—can be effectuated through a reading that gives every word its ordinary and natural meaning. In § 3624(a), Congress

provided that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's *term of imprisonment, less any time credited* toward the service of the prisoner's sentence as provided in subsection (b)." 18 U.S.C. § 3624(a) (emphasis added). Because the time a prisoner serves is based on the difference between the "term of imprisonment" and any GTC awarded, Congress could only have meant "term of imprisonment" here to mean the sentence imposed, not the time actually served. Congress likewise used "term of imprisonment" to mean the sentence imposed when it provided in § 3624(b) that a prisoner "may receive credit toward the service of the prisoner's sentence" if he "is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner's life . . . ." 18 U.S.C. § 3624(b)(1) (emphasis added).

Section 3624(b)(1) sets forth not only the conditions of good behavior that a prisoner must meet to remain eligible for the maximum credit, but the schedule on which the credit will be earned. Specifically, it provides that a prisoner "may receive credit toward the service of the prisoner's sentence, *beyond the time served*, of up to 54 days *at the end of each year of the prisoner's term of imprisonment*, beginning at the end of the first year of the term," so long as the prisoner has met the behavior criteria "during that year." *Id.* (emphasis added). Because Congress required the credit to be applied "at the end" of each year of the term, not *after* the end, the prisoner should receive the credit during the same year in which he accrues it.[2] Thus, a prisoner will serve his sentence through

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[2] Both dictionary definitions and common usage demonstrate that the prepositions "at" and "after" have distinct meanings. *Merriam-Webster* defines "at" primarily "as function word used

a combination of days actually incarcerated and GTC, such that a prisoner earning the maximum credit will face only 311 days of actual incarceration for each year of the term of imprisonment. During the last part of each such year of that sentence, assuming good conduct since the last award, the prisoner will receive "credit" toward the full term of the sentence of an additional 54 days "beyond the time served," *id.*, even though the prisoner was not actually incarcerated for the final 54 days attributable to that year.

In practice, this means that after the prisoner is incarcerated for 311 days, with good conduct, the remaining 54 days of the year should be credited as having been served, even though the prisoner was not actually incarcerated for those days. As a result, the 312th day of incarceration then should be counted not as Day 312 of Year 1 of the sentence, but as Day 1 of Year 2. The days in each subsequent year of the sentence may be counted in similar fashion, such that a well-behaved prisoner receives 54 days of credit after every 311 days of actual incarceration (or 312 for leap years). Thus, by adding 54 days of credit on each 311th day of actual incarceration, the prisoner

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to indicate presence in, on, or near," but "after" as "behind in place" or "subsequent in time or order." *Webster's Ninth New Collegiate Dictionary* 63, 111 (Merriam-Webster 1987). Moreover, as the district court amply explained in *Moreland v. Federal Bureau of Prisons*, the phrase "at the end" ordinarily is used to signify occurrence during the latter part of something, not occurrence subsequent to it. 363 F. Supp. 2d 882, 887 (S.D. Tex. 2005) ("King Lear dies at the end of the play, not after the play. . . . Halloween comes at the end of October, not after."), *reversed by* 431 F.3d 180 (5th Cir. 2005). Under BOP's method, however, GTC is never credited to a prisoner in the same year in which it is accrued, except for during the final year of incarceration. *See infra* 10–11.

should receive the GTC at "the end of each year of the prisoner's term of imprisonment," with each year being the sum of days actually incarcerated and days credited for good behavior.

Because many sentences end in partial years, the last portion should be counted differently: "[C]redit for the last year or portion of a year of the term of imprisonment [is] prorated and credited within the last six weeks of the sentence." § 3624(b)(1). For example, Mr. Barber was sentenced to a term of 320 months' imprisonment, which equals 26 years and 8 months. After he is credited for service of the first 26 years through a combination of actual incarceration and GTC, the maximum GTC available for the final eight-month period should be prorated and credited not "at the end of the year," but sometime "within the last six weeks" before the date on which his sentence would be complete, should full GTC be awarded.[3] Because eight months is two-thirds of a year, prorating 54 days yields 36 days of GTC available to Mr. Barber for the last eight months of his term of imprisonment. The end result is that the total maximum GTC available to a prisoner equals the number of years in the term of imprisonment multiplied by 54.[4]

Under this reading of § 3624, the phrase "term of imprisonment" carries the same meaning wherever it

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[3] This advanced six-week window in which to apply the final GTC toward a prisoner's sentence makes practical sense, as it enables both BOP and the prisoner to plan in advance for a specific release date.

[4] Because GTC does not vest until the prisoner is released, 18 U.S.C. § 3624(b)(2), it is possible that GTC previously awarded may later be revoked prior to the release date (such as, for example, when prior bad conduct is only discovered after GTC has been awarded).

is used, and every word of the statute is given its ordinary meaning. Cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). For instance, under petitioner's reading, the word "year" carries its normal meaning—a period of 365 days (or 366 in leap years), and, as the statute requires, each 365-day period is counted as a combination of calendar days and GTC days. Likewise, by reading "term of imprisonment" to mean "sentence imposed" in every instance, it becomes possible to reconcile its meaning in subsections (a) and (d) of § 3624: Section 3624(d) lists BOP's obligations to a prisoner upon the "expiration" of the term of imprisonment, and § 3624(a) provides that this "date of the expiration" of the term of imprisonment is arrived at by subtracting the days of GTC from the number of days in the sentence imposed.

Moreover, this method of counting confers no windfall upon any prisoner, since it accounts for every day of the sentence imposed and awards no more than 54 days of GTC for each full year of the sentence and the prorated portion for the final stub year. In other words, this reading does not require any prisoner to be released earlier than Congress intended.

B. BOP's Convoluted Reading Of The Statute Is Impermissible.

BOP, in contrast, applies the statute to allow for a maximum of 54 days of GTC *after* each full year of *actual incarceration*, with credit prorated for the final partial year of incarceration. See 28 C.F.R. § 523.20 (2008); BOP Sentence Computation Manual, Program Statement ("PS") 5880.28, 1-40–1-61B (July 20, 1999). Unlike the plain reading that supports

Petitioners' approach, BOP's convoluted method does inescapable violence to the words of the statute.

BOP itself admits that calculating the total GTC available under its method is "arithmetically complicated." PS 5880.28 at 1-44. For example, if a prisoner is sentenced to a term of ten years' imprisonment, BOP will credit him with a maximum 54 days per year of GTC for the first eight years of actual incarceration, for a total of 432 days of GTC—enough to qualify him for release sometime during his ninth year of actual incarceration. The prisoner will receive an additional, prorated amount of GTC for the amount of time he is incarcerated during the ninth year, but that amount will depend on the number of days he is incarcerated during the ninth year, which will in turn depend on the amount of GTC awarded for the ninth year. To resolve this circular dilemma, BOP employs a complex eight-step formula, *id.* at 1-44–1-48; applying that formula to the partial ninth year in the example here yields a result of 38 days of GTC, for a total of 470 GTC days earned during the entire incarceration.[5] In contrast, the straightforward method Petitioner reads § 3624(b) as requiring would result in a maximum 540 days of GTC (54 days x 10 years)—a difference of 70 days, or ten full weeks.

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[5] If a prisoner earns the maximum 432 days GTC after being incarcerated for eight years on a ten-year sentence, he will enter his ninth year of incarceration with 298 days left to serve (assuming no leap years in the ninth and tenth years). Under the BOP formula, GTC in the final year accrues at a rate of 0.148 per day (54 days GTC divided by 365 days in a year). After serving 260 days in the ninth year, the prisoner will have accrued 38 days of GTC in that year (260 x 0.148 = 38.48), which, when awarded and added to the 260 days of actual incarceration, bring the prisoner to the 298 days he began the year needing to serve.

BOP's complex calculations are certainly not mandated by the text of § 3624, since Petitioner's approach faithfully interprets the statute while giving every word its ordinary meaning. See *supra* 6–10. Neither is BOP's approach based on a permissible alternative reading of the text. The statute provides that a prisoner may accrue a credit "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment," § 3624(b)(1); BOP's accrual method can only accord with this text if "term of imprisonment" is read to mean "time served." But Congress used the phrase "term of imprisonment" repeatedly in § 3624, and, even under BOP's interpretation, the phrase in those contexts necessarily must refer to the sentence imposed, not time served.

First, in § 3624(a), Congress set a prisoner's release date as the date on which his "term of imprisonment" expires, less any GTC awarded under § 3624(b). 18 U.S.C. § 3624(a). In other words, the time of actual incarceration is equal to the "term of imprisonment" minus GTC; "term of imprisonment" thus cannot mean anything here but the sentence imposed. But because BOP necessarily treats "term of imprisonment" as having different meanings in subsections (a) and (b), BOP's reading can only stand if this Court makes the extraordinary assumption that Congress intended for a *single* variable—"term of imprisonment"—to have *multiple* meanings within a *single* calculation of a prisoner's release date.

Second, BOP itself interprets "term of imprisonment" to have two separate meanings within the first sentence of § 3624(b)(1). When a prisoner is sentenced to imprisonment for a year and a day, BOP will award the prisoner a maximum 47 days of GTC (rather than the full 54) because, once the GTC is

applied, the prisoner's time of actual incarceration will be less than one year. See PS 5880.28 at 1-44–1-47. Yet this construction violates the plain terms of the statute because, under § 3624(b)(1), GTC may only be awarded if the prisoner "is serving a term of imprisonment of more than 1 year"; if "term of imprisonment" here meant time served, BOP would improperly be awarding GTC to a prisoner serving a *sentence* of a year and a day that, with GTC applied, results in *time served* of less than a year. Thus, BOP's application of § 3624(b)(1) is based on an interpretation of "term of imprisonment" that means "sentence imposed" at the beginning of the sentence and "time served" in the very next clause.

Third, the phrase "term of imprisonment" is used consistently in sentencing statutes and common parlance to refer to the sentence imposed, such that it has developed usage as a term of art. See Pet'rs. Br. 25–31. By using this term of art, rather than the phrase "time served," Congress strongly indicated that it meant to use the ordinary meaning of the phrase. Cf. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297 (2006).

In contrast to the plain language reading of § 3624 that supports Petitioners' view, BOP's stilted interpretation is simply not a permissible reading of § 3624(b)(1). See *Sorenson*, 475 U.S. at 860; *Brown*, 513 U.S. at 118. As such, it should be accorded no deference. See *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842–43 & n.9.

II. IF THE STATUTE IS AMBIGUOUS, LENITY REQUIRES THE STATUTE BE CONSTRUED IN PETITIONERS' FAVOR AND PRECLUDES DEFERENCE TO BOP'S INTERPRETATION.

Even if this Court were to conclude that the words of § 3624(b) are ambiguous, the rule of lenity nonetheless would require it to interpret the statute in Petitioners' favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Because § 3624(b) defines a defendant's penalty by specifying the minimum time that defendant must serve in prison, it qualifies as a penal statute to which the rule of lenity applies. That conclusion ends the inquiry. As a tool of statutory construction, the Court must apply lenity to resolve the ambiguity before even considering deferring to an agency interpretation. Moreover, the principles underpinning the rule of lenity are inconsistent with deference to administrative agencies, especially when that agency also acts as the prosecutor.

A. Section 3624(b) Is a Penal Statute To Which the Rule of Lenity Applies.

As this Court has recognized, the rule of lenity applies not just to statutes prescribing criminal conduct, but to statutes defining the scope of criminal penalties. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (invoking lenity to resolve doubts in defendant's favor about Congress's intent to impose a special parole term); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality op.) (lenity should resolve any ambiguity "about the severity of sentencing"); *id.* at 307–11 (Scalia, J., concurring, joined by Kennedy, J., and Thomas, J.) (agreeing that lenity should apply to the sentencing statutes).

Under those precedents, there can be no doubt that § 3624(b) is a penal statute, because it defines the minimum time defendants must serve in prison if convicted. See *Lynce* v. *Mathis*, 519 U.S. 433, 440 n.12, 445–46 (1997) (recognizing that statutes governing parole and the award of good-behavior credits are penal, just like statutes that govern initial sentencing, because they affect the duration of imprisonment) (citing *Weaver* v. *Graham*, 450 U.S. 24, 32 (1981)). More than just a statute ancillary to the conditions of incarceration, § 3624(b) defines the length of incarceration itself and thus "is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, 450 U.S. at 32 (citing *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974)).

Indeed, when compared to other statutes that courts have deemed penal and construed leniently, this case requires the most forceful application of the lenity doctrine. Courts apply lenity even in the context of statutes that, at least facially, appear more regulatory than penal; for example, courts will apply lenity to a statute that regulates the use of proper machine safeguards if it subjects violators to fines or the loss of use of a machine. See *Krugh* v. *Miehle Co.*, 503 F.2d 121, 125 (6th Cir. 1974). Likewise, because the construction of § 3624(b) determines whether a person is deprived of his or her liberty, the statute is penal. Cf. *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 376 (1973) (holding that a law subjecting defendants to "modest" fines does not require the court to "construe [the statute] as narrowly as a criminal statute providing graver penalties, such as prison terms").

Accordingly, if the Court finds that § 3624(b) is ambiguous, the Court must "apply the rule of lenity

and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54 (adopting interpretation of statutory minimum sentence that was more favorable to defendant because the "text, structure, and history fail to establish that the Government's position is unambiguously correct").

B. The Rule of Lenity Requires Resolving Ambiguity in Favor of the Defendant.

The rule of lenity is one of the oldest tools of construction in existence, "perhaps not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, J.), and continues to apply as a "venerable" canon. *R.L.C.*, 503 U.S. at 305 (plurality op.); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.). It requires that "before a man can be punished, his case must be plainly and unmistakably within the statute," *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), such that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Thus, "[w]here the law may be so construed as to give a penalty, and also, and as well, so as to withhold the penalty, it should be given the latter construction." *Black's Handbook on the Construction and Interpretation of the Laws* 455 (2d ed. 1911).

As this Court has long explained, the rule rests upon two foundations. First, it "is founded on the tenderness of the law for the rights of individuals," *Wiltberger*, 18 U.S. at 95, and "vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed." *Santos*, 128 S. Ct. at 2025. Accordingly, "'a fair warning should be given to the world in language that the common world will understand, of

what the law intends to do if a certain line is passed.'" *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). See also *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995).

Second, the rule rests on "the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95. Quite simply, "within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). Penal statutes defining the scope of punishment require clear legislative action "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). "This policy embodies 'the instinctive distaste against men languishing in prison unless the *lawmaker* has clearly said they should.'" *Id.* (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)) (emphasis added). Indeed, it has been noted that, compared with that of the executive and the judiciary, "[t]he nature of [the legislature's] public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people." *The Federalist No. 49*, at 315 (James Madison) (Penguin Books 1987).

Of course, because the rule of lenity applies "when choice has to be made between two readings" of a statute, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952), ambiguity is a

threshold question. "Where there is no ambiguity in the words, there is no room for construction," *Wiltberger*, 18 U.S. at 95–96, and it would indeed be improper to rely on lenity to create an ambiguity where none otherwise exists. See *id.* at 95. Where, however, the words are susceptible to more than one possible interpretation, the rule of lenity definitively resolves the matter. See *Whalen*, 445 U.S. at 694 ("To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt *must* be resolved in favor of lenity.") (emphasis added); *Bifulco*, 447 U.S. at 400 (same); *R.L.C.*, 503 U.S. at 307–08 (Scalia, J., concurring) ("The rule of lenity, in my view, prescribes the result when a criminal statute is ambiguous: The more lenient interpretation must prevail.").

Accordingly, even if the text of § 3624(b) were ambiguous, traditional and time-honored rules of construction would require this Court to read the statute in favor of lenity—which here requires granting Petitioners the greater measure of credit toward their sentences.

C. Doctrines of Administrative Deference Are Incompatible With The Rule of Lenity.

Doctrines of administrative deference do not direct a contrary result. To be sure, courts defer to reasonable agency interpretations of the statutes that Congress delegated them authority to administer, *Chevron*, 467 U.S. at 843–44. And, as to agency interpretations formed in the absence of a congressional grant of authority to bind parties with legal force, courts apply a lesser degree of deference under *Skidmore* v. *Swift*, 323 U.S. 134 (1944). See *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001). But neither of these standards provides a

basis for this Court to defer to a law enforcement agency's interpretation of a statute where that interpretation ignores as fundamental a rule of construction as the lenity canon. When the rule of lenity applies, there can be no ambiguity for deference to resolve; moreover, the rationales that drive deference flatly contradict and must yield to the principles that mandate lenity.

1. By Resolving Statutory Ambiguity, the Rule of Lenity Eliminates Any Need to Consider Agency Interpretations.

Deference to agency interpretations is fundamentally at odds with the rule of lenity because a basic prerequisite to deference is a determination that the statute is ambiguous, and does not "unambiguously require[ ] the court's construction." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 984–85 (2005). Courts, not agencies, are "the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 842–43 & n.9. Accordingly, the judiciary must decide whether the statute reflects Congress's intent on the issue at hand or instead is ambiguous. *Id.* Absent the prerequisite ambiguity, there can be no deference to a contrary agency interpretation.

Yet, when a penal statute is under review, any ambiguity that could open the door to deference is shut by the rule of lenity. In determining whether a statute is ambiguous, courts employ the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. The rule of lenity is such a "tool[] of statutory construction," *Busic* v. *United States*, 446 U.S. 398, 406–407 (1980), and has been employed as

such for centuries. See *supra* 16. And, because the rule "*constrain*[*s*]" courts "to interpret any ambiguity in the statute in [the defendant's] favor," *Leocal*, 543 U.S. at 11 n.8 (emphasis added), the rule of lenity resolves any ambiguity, leaving no room for deference to a contrary agency interpretation. Indeed, in *Brand X*, this Court specifically identified the rule of lenity as a "rule of construction" that would "requir[e] [the court] to conclude that the statute was unambiguous." 545 U.S. at 985.

Giving the rule of lenity priority over deference is consistent with this Court's cases holding that other substantive canons that resolve statutory ambiguity precede agency deference. For example, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), an agency had interpreted an otherwise ambiguous statute against an alien contrary both to the "presumption against retroactive application" and the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting *INS* v. *Cardoza & Fonseca*, 480 U.S. 421, 449 (1987)). The Court held that it can "only defer, however, to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *Id.* at 320 n.45 (internal quotation marks omitted). Deference, therefore, was inappropriate because the applicable substantive canons resolved any ambiguity as a threshold matter. *Id.*

In *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the Court explained that the canon of constitutional avoidance plays a similar role in reviewing an agency interpretation. The Court found that the statute's text and legislative history did not unambiguously compel the agency's view, *id.* at 588,

and acknowledged that the agency's view would normally be entitled to *Chevron* deference. *Id.* at 575. But, because the agency's view raised serious constitutional questions, the Court declined to defer, holding that under the applicable canon of construction, "the Court *will* construe the statute to avoid [constitutional] problems." *Id.* at 575 (emphasis added). See also *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194–95, 1201 (2009) (applying the presumption against preemption of state police powers and declining to defer to agency interpretation); *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (canon against "federal encroachment upon a traditional state power" displaces agency deference).

These holdings are perfectly consistent with the notion that *Chevron* deference is justified because "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). First, the very essence of canons of construction like lenity is to direct the court when a statute's text is unclear. They are part and parcel of the search for ambiguity, which itself is a precondition of deference. See *Chevron*, 467 U.S. at 843 n.9. Second, substantive canons, such as those requiring lenity or the avoidance of serious constitutional questions, operate so that courts must interpret ambiguity to mean that Congress intended certain substantive results. See, *e.g.*, *Bass*, 404 U.S. at 348 (courts must not give ambiguous penal statutes the more expansive reading because "legislatures and not courts should define criminal activity"); *St. Cyr*, 533 U.S. at 336 (O'Connor, J., dissenting) ("The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional

intent, by giving ambiguous provisions a meaning that will . . . conform with Congress's presumed intent not to enact measures of dubious validity.") (emphasis omitted). Because Congress is presumed to have intended for ambiguity to require these results, Congress cannot also be presumed to have intended for the same ambiguity to authorize contrary results through the administrative process. See *Solid Waste Agency*, 531 U.S. at 172–73 (the canon of avoidance trumps *Chevron* deference based on "our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.")[6]

And, just as the rule of lenity is one of the tools of construction that courts must utilize before they may defer under *Chevron* to agency interpretations, so too must courts utilize this rule prior to deferring under *Skidmore*. Under *Skidmore*, courts are to defer to agency interpretations only to the extent that they have the "power to persuade," 323 U.S. at 140, and an interpretation that misapplies fundamental interpretive canons is hardly persuasive. Accord *Gen. Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 600 (2004) (an agency interpretation that is "clearly wrong" is entitled to no deference under either *Chevron* or *Skidmore*).

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[6] The rule of lenity shares a particular kinship with the avoidance canon because "a lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns." William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 600 (1992).

2. The Principles Underlying the Rule of Lenity Override the Rationales for Administrative Deference.

Deference would be particularly inappropriate in this case because the foundational principles on which the rule of lenity is built—fair notice and legislative supremacy, see *supra* 16–17—are incompatible with deference to BOP's interpretation.

a. The rule of lenity recognizes that criminal sanctions should be imposed only on someone who received "'a fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Arthur Andersen LLP*, 544 U.S. at 703 (quoting *McBoyle*, 283 U.S. at 27). Deference to an agency interpretation, however, is predicated upon a court finding that the statute is ambiguous, a finding that necessarily implies that Congress has not given "fair warning." Here, the requisite "warning" was not supplied by BOP, either. At the time of Petitioners' sentencing—which preceded the promulgation of 28 C.F.R. § 523.20—BOP's interpretation was contained in an internal memorandum that was implemented without any public notice or comment. See Pet'rs. Br. 8–9. Although the notion that statutes "give adequate notice to the citizen is something of a fiction, . . . necessary fiction descends to needless farce" if courts deem BOP's obscure Program Statement to be sufficient notice. See *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring).[7]

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[7] The result should not be any different for a prisoner who was sentenced after BOP's method became codified as a federal regulation. Particularly in light of the legislature's supremacy in defining punishment, even the most robust administrative notice does not obviate the need for courts to apply the lenity

The need for "a fair warning" is particularly acute with respect to calculating GTC because "a prisoner's eligibility for reduced imprisonment" often factors into a defendant's decision to enter a guilty plea. See *Weaver*, 450 U.S. at 32. But strong evidence suggests that many of the people most familiar with § 3624 understand it to provide for more GTC than BOP allows. See Pet'rs. Br. 33–36. If BOP imposes a cap on GTC that is lower than defendants reasonably expect, those defendants will end up being incarcerated for longer than the time for which they thought they had bargained.

b. Deference here also would undermine the fundamental precept that the task of defining punishment rests solely with the legislature. See *supra* 16–17. Penal statutes carry the weight of a community's "moral condemnation," *Bass*, 404 U.S. at 348, and Congress represents the popular will in a way that the judiciary, the executive, and the agencies simply cannot. See *The Federalist No. 49*, *supra* 17. If Congress cannot be presumed to have abdicated this responsibility by allowing the judiciary to define penalties that are not clearly within a statute, neither can it be presumed to have intended to effect a similar abdication through the agencies. Cf. *Solid Waste Agency*, 531 U.S. at 172–73.

Deference to BOP's construction of penal statutes is especially inappropriate because, as a branch of the Department of Justice, BOP is an agent of the prosecutor, the Attorney General. The justifications for deference are never more in conflict with the values underlying lenity than when an agency of the prosecuting authority interprets a law governing the

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canon. But because the notice in this case is particularly deficient, this Court need not go that far in its analysis.

duration of criminal incarceration. For this reason, Justice Department interpretations of criminal statutes traditionally receive skepticism, not deference. See *Santos*, 128 S. Ct. at 2028 (plurality op.) ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.").

Indeed, the statutes under which BOP operates provide compelling evidence that Congress never intended for courts to defer to BOP's construction of statutes governing the duration of criminal incarceration. Whereas Congress vested the "control and management" of the federal prisons in the Attorney General,[8] 18 U.S.C. § 4001(b)(1), it specifically reserved that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* § 4001(a). Likewise, under § 3624 itself, Congress delegated to BOP only the authority to determine *whether* prisoners have qualified for good-time credit,[9] *not* to determine how much credit is allowed under the statute.

Thus, although Congress plainly envisioned deference to the Attorney General in running the

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[8] BOP, "under the direction of the Attorney General," has "charge of the management and regulation" of all federal prisons. 18 U.S.C. § 4042(a)(1).

[9] *See* 18 U.S.C. § 3624(b) (conditioning an award of good-time credit on BOP's determination that the prisoner has "satisfactorily complied" with established expectations). Such a determination, which requires agency expertise in the assessment of prisoner behavior, may be entitled to deference. *See Lopez* v. *Davis*, 531 U.S. 230, 242, 244 (2001) (deferring to BOP rulemaking regarding prisoners' eligibility for early release after participation in substance abuse program, where BOP was delegated broad authority to determine eligibility criteria and imposed stringent criteria based upon its expertise).

day-to-day affairs of prison facilities, it is implausible to think that Congress also intended for the Attorney General—the very authority that advocates sentences before the courts, often at levels higher than ultimately imposed—to *dictate* the interpretation of statutes governing the duration of criminal incarceration. To allow this "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity." *Crandon* v. *United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

This Court's decision in *Reno* v. *Koray*, 515 U.S. 50 (1995), is not to the contrary. At issue in *Koray* was BOP's interpretation of a statute regarding whether a prisoner's time spent in a community treatment center while "released" on bail counted toward his time served. See *id.* at 61, 65. The Court first determined that BOP's construction was prescribed by the statute's text, structure, and history. *Id.* at 59–61. Taken in context, then, the Court's suggestion that BOP's interpretation was "entitled to some deference" meant simply that the interpretation matched the statute's unambiguous meaning. *Id.* at 61 (BOP's understanding was "the most natural and reasonable reading"); see also *id.* at 62 (rejecting prisoner's reading not based on the agency's view, but "in light of the foregoing textual and historical analysis"). Accordingly, the Court declined to apply lenity, not out of deference to BOP's position, but because the "statute [was] not 'ambiguous.'" *Id.* at 64–65 (citation omitted).

c. These principles put the lie to any notion that Congress intended for BOP to resolve statutory ambiguity in opposition to lenity. And indeed, the Ninth Circuit correctly recognized that *Chevron* deference is not available to BOP's interpretation of

§ 3624(b). JA-44–45, JA-46–48. The court, however, then erroneously assumed that it should instead defer under *Skidmore*. JA-48. That is incorrect, for so-called *Skidmore* deference is just as fundamentally inconsistent with the rule of lenity as is *Chevron* deference; in fact, the inconsistency is even greater.

First, while the rule of lenity constitutes a binding mandate on courts, *Skidmore* does not. To the contrary, *Skidmore* affirmed that agency interpretations are "not controlling upon the courts by reason of their authority." 323 U.S. at 140. Rather, *Skidmore* stated only that "courts and litigants *may* properly resort" to agency interpretations "for guidance." *Id.* (emphasis added). Further, *Skidmore* suggests a court should give weight to agency interpretations "only to the extent that those interpretations have the 'power to persuade,'" which is to say, to the extent the court agrees with them. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). In stark contrast, when a court finds a penal statute ambiguous, the rule of lenity provides that the ambiguity "*must* be resolved in favor of lenity." *Whalen*, 445 U.S. at 694 (emphasis added).

Second, the reasons why a court may accord weight to an agency view under *Skidmore* are inapposite to most penal statutes. *Skidmore* suggested that the courts may rely on agency interpretations that are based on "'specialized experience and broader investigations and information'" than the court possesses. *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139). Thus, *Skidmore* merely stands for the truism that agency interpretations may "constitute a body of experience and informed judgment." 323 U.S. at 140.

As with most penal statutes, however, interpreting § 3624(b) does not require any "specialized experience." To the contrary, Congress intended § 3624(b) to provide a clear-cut and easily administered formula. See Pet'rs. Br. 31–33. Indeed, the needless complexities associated with BOP's scheme are entirely of BOP's making, and cannot justify a bid for deference.

The rare instance in which this Court has contemplated deferring to an agency construction of a penal statute proves the rule that deference is generally unavailable. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the agency acted pursuant to a clear congressional grant of "latitude" over a complex environmental protection scheme that demanded a high "degree of regulatory expertise." *Id.* at 703–04. In contrast, § 3624(b) grants no agency latitude to interpret what Congress believed to be a straightforward calculation, nor does interpreting the statute require administrative expertise. Indeed, "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment," such that the branch of government with the greatest "special knowledge and expertise" may, in fact, be the judiciary itself. *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989).

Finally, even if so-called *Skidmore* deference could coincide with the rule of lenity, such deference should not be accorded to BOP's Program Statement. BOP applied no special expertise in formulating it, has no congressionally-delegated authority to construe § 3624(b), and has conceded that it failed to engage in reasoned deliberation. JA-45, JA-46. Cf. *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006) (denying *Skidmore* deference to Attorney General's legal conclusion

where—as here—the Attorney General purported to establish an interpretation beyond his delegated power, "lack[ed] expertise in this area," and failed to engage in "reasoned" decisionmaking).

III. CORRECTLY CALCULATING GTC WILL CONSERVE FEDERAL RESOURCES, EASE PRISON OVERCROWDING, AND PROTECT PRISONERS' LIBERTY INTERESTS.

The difference between these two readings of the statute carries enormous human, social, and financial costs. At stake is a full week per year of additional incarceration; to put it in perspective, "[o]ne day in prison is longer than almost any day you and I have had to endure." Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003). And these additional days add up: for instance, in Mr. Barber's case, under BOP's methodology he will serve 186 days—or more than half a year—more than Congress provided. Once the legislature has determined the amount of credit that a prisoner exhibiting good behavior is due, any additional incarceration inappropriately deprives a prisoner of the "'priceless gift'" of liberty. *Id.*; cf. *Glover* v. *United States*, 531 U.S. 198, 203 (2000) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."). During that time, prisoners being held longer than authorized could miss a child's graduation, a chance to be with an ill parent in her last days, or the opportunity to spend the holidays with a family from which they have long been separated. Indeed, BOP's standard for awarding GTC deprives current prisoners collectively

of 36,000 years of liberty that Congress never intended for them to lose. Pet'rs. Br. 11.

In addition to the costs to individual prisoners and their loved ones, society incurs substantial and unnecessary burdens through this overincarceration. At a time when the federal budget is severely strained, BOP is nonetheless incurring approximately $97 million per year in unnecessary costs due to its incorrect GTC policy; over the course of incarcerating all current prisoners, BOP will pay nearly $1 billion extra from the federal Treasury due to this policy. See *id.*; see also 18 U.S.C. § 4007 (costs of incarcerating federal prisoners "shall be paid out of the Treasury of the United States"). Particularly given the $25,894.50 average cost per year to incarcerate each federal prisoner, Admin. Office of U.S. Courts Press Release, http://www.uscourts.gov/newsroom/2009/costsOfImprisonment.cfm, and the billions spent annually on the federal prison system, see Bureau of Justice Statistics, Dep't of Justice, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16, "[w]hen it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long." ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates, August 2004, at 3. Moreover, in addition to such direct costs, the government incurs the significant collateral costs of maintaining and caring for the dependents of inmates, as well as lost tax revenues that could be derived from the income that inmates would have earned upon re-integration into the community. *Id.* at 17.

Further, the additional incarceration caused by BOP's policy ultimately increases the headcount in a

prison system that is already badly overcrowded. See Federal Bureau of Prisons: Oversight Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (July 21, 2009) (statement of Harley G. Lappin, Director, BOP), at 2, *available at* http://judiciary.house.gov/hearings/pdf/Lappin080506.pdf (noting that BOP is operating at 37% above its rated capacity). Such overcrowding significantly undermines a wide variety of important penological interests. A BOP study found that a mere one percent increase in a prison's inmate population boosted an institution's annual serious assault rate by 4.09 per 5000 inmates. *Id.* at 3. Further, overcrowding and corresponding BOP understaffing is substantially inhibiting BOP's ability to "provide all inmates with the breadth of programs they need to gain skills and training necessary to prepare them for a successful reentry into the community." *Id.* at 2. This Court has long recognized that "[t]he problems of administering prisons within constitutional standards are indeed complex and intractable, but at their core is a lack of resources allocated to prisons." *Rhodes* v. *Chapman*, 452 U.S. 337, 357 (1981) (internal quotation marks and citations omitted). Reducing overcrowding by giving effect to Congress's intended 85% GTC rule would be a significant step towards ameliorating these problems.

As BOP has repeatedly indicated, it does not believe it has the authority to apply GTC the way Congress prescribed. This Court should correct the Bureau's misunderstanding and enable it to fulfill its commitment to use "all of the tools at its disposal to ensure that inmates earn as much good time as is allowed under the law." Lappin at 4. Doing so would immediately improve prison conditions, conserve

precious federal funds, and protect prisoners' liberty interests. See *Zadvydas*, 533 U.S. at 690.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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January 21, 2010

APPENDIX

APPENDIX

LIST OF FEDERAL PUBLIC AND COMMUNITY DEFENDERS JOINING AS *AMICI CURIAE*

FIRST CIRCUIT:

David Beneman, Federal Public Defender, District of Maine

Miriam Conrad, Federal Public Defender, Districts of Massachusetts, New Hampshire and Rhode Island

Hector Guzman, Acting Federal Public Defender, District of Puerto Rico

SECOND CIRCUIT:

Alexander Bunin, Federal Public Defender, Northern District of New York

Thomas G. Dennis, Federal Public Defender, District of Connecticut

Michael L. Desautels, Federal Public Defender, District of Vermont

Leonard F. Joy, Executive Director, Federal Defenders of New York, Inc., Eastern and Southern Districts of New York

Marianne Mariano, Federal Public Defender, Western District of New York

THIRD CIRCUIT:

Edson A. Bostic, Federal Public Defender, District of Delaware

Richard Coughlin, Federal Public Defender, District of New Jersey

Lisa B. Freeland, Federal Public Defender, Western District of Pennsylvania

Thurston T. McKelvin, Federal Public Defender, District of Virgin Islands

Leigh Skipper, Chief Federal Defender, Defender Association of Philadelphia, Eastern District of Pennsylvania

James V. Wade, Federal Public Defender, Middle District of Pennsylvania

FOURTH CIRCUIT:

Louis C. Allen III, Federal Public Defender, Middle District of North Carolina

Brian J. Kornbrath, Federal Public Defender, Northern District of West Virginia

Thomas P. McNamara, Federal Public Defender, Eastern District of North Carolina

Michael S. Nachmanoff, Federal Public Defender, Eastern District of Virginia

Mary Lou Newberger, Federal Public Defender, Southern District of West Virginia

Claire Rauscher, Executive Director, Federal Defenders of Western North Carolina, Inc., Western District of North Carolina

Larry W. Shelton, Federal Public Defender, Western District of Virginia

Parks Nolan Small, Federal Public Defender, District of South Carolina

James Wyda, Federal Public Defender, District of Maryland

FIFTH CIRCUIT:

Richard A. Anderson, Federal Public Defender, Northern District of Texas

Henry J. Bemporad, Federal Public Defender, Western District of Texas

G. Patrick Black, Federal Public Defender, Eastern District of Texas

Rebecca L. Hudsmith, Federal Public Defender, Western District of Louisiana

Samuel Dennis Joiner, Federal Public Defender, Southern District of Mississippi

Marjorie A. Meyers, Federal Public Defender, Southern District of Texas

Virginia Schlueter, Federal Public Defender, Eastern District of Louisiana

SIXTH CIRCUIT:

Elizabeth Ford, Executive Director, Federal Defender Services of Eastern Tennessee, Inc., Eastern District of Tennessee

Ray Kent, Federal Public Defender, Western District of Michigan

Henry A. Martin, Federal Public Defender, Middle District of Tennessee

S. S. Nolder, Federal Public Defender, Southern District of Ohio

Stephen B. Shankman, Federal Public Defender, Western District of Tennessee

Miriam L. Siefer, Chief Federal Defender, Legal Aid & Defender Assoc. of Detroit, Eastern District of Michigan

Dennis G. Terez, Federal Public Defender, Northern District of Ohio

Scott Wendelsdorf, Executive Director, Western Kentucky Federal Community Defender, Inc., Western District of Kentucky

SEVENTH CIRCUIT:

Carol Brook, Executive Director, Federal Defender Program, Northern District of Illinois

Jerome T. Flynn, Executive Director, Federal Community Defenders, Inc., Northern District of Indiana

Phillip J. Kavanaugh, Federal Public Defender, Southern District of Illinois

William E. Marsh, Executive Director, Indiana Federal Community Defender, Inc., Southern District of Indiana

Richard H. Parsons, Federal Public Defender, Central District of Illinois

Daniel Stiller, Federal Defender, Eastern & Western Districts of Wisconsin

EIGHTH CIRCUIT:

Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri

Nicholas T. Drees, Federal Public Defender, Southern District of Iowa

Jenniffer Morris Horan, Federal Public Defender, Eastern and Western Districts of Arkansas

Lee Lawless, Federal Public Defender, Eastern District of Missouri

Katherian D. Roe, Federal Public Defender, District of Minnesota

David Stickman, Federal Public Defender, District of Nebraska

Jana M. Miner, Acting Federal Public Defender, Districts of North Dakota and South Dakota

NINTH CIRCUIT:

Daniel J. Broderick, Federal Public Defender, Eastern District of California

Reuben Cahn, Executive Director, Federal Defenders of San Diego, Inc., Southern District of California

Fred Richard Curtner, Federal Public Defender, District of Alaska

Frances A. Forsman, Federal Public Defender, District of Nevada

Tony Gallagher, Executive Director, Federal Defenders of Montana, District of Montana

John T. Gorman, Federal Public Defender, District of Guam

Thomas W. Hillier II, Federal Public Defender, Western District of Washington

Sean Kennedy, Federal Public Defender, Central District of California

Roger Peven, Executive Director, Federal Defenders of Eastern Washington, Eastern District of Washington

Barry J. Portman, Federal Public Defender, Northern District of California

Samuel Richard Rubin, Executive Director, Federal Defender Services of Idaho, Inc., District of Idaho

Jon M. Sands, Federal Public Defender, District of Arizona

Peter C. Wolff, Jr., Federal Public Defender, District of Hawaii

TENTH CIRCUIT:

Cyd Gilman, Federal Public Defender, District of Kansas

Steven B. Killpack, Federal Public Defender, District of Utah

Stephen P. McCue, Federal Public Defender, District of New Mexico

Raymond P. Moore, Federal Public Defender, Districts of Colorado and Wyoming

Julia L. O'Connell, Federal Public Defender, Northern and Eastern Districts of Oklahoma

Susan M. Otto, Federal Public Defender, Western District of Oklahoma

ELEVENTH CIRCUIT:

Donna Lee Elm, Federal Public Defender, Middle District of Florida

Christine Freeman, Executive Director, Middle District of Alabama Federal Defender Program, Inc., Middle District of Alabama

Christopher Jarrard, Acting Community Defender, Federal Defenders of the Middle District of Georgia, Inc., Middle District of Georgia

Stephanie Kearns, Executive Director, Georgia Federal Defender Program, Inc., Northern District of Georgia

Randolph P. Murrell, Federal Public Defender, Northern District of Florida

Carlos Williams, Executive Director, Southern Federal Defender Program, Inc., Southern District of Alabama

Kathleen Williams, Federal Public Defender, Southern District of Florida

DISTRICT OF COLUMBIA CIRCUIT:

A. J. Kramer, Federal Public Defender, District of District of Columbia

AMICUS CURIAE BRIEF

MOTION FILED

JAN 2 1 2010

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No. 09-5201

In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,

v.

J.E. THOMAS, Warden, FCI Sheridan,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PIERCE O'DONNELL IN SUPPORT OF PETITIONERS

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BOTH SCANNED

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Solicitor General of the United States consents to the filing of this *amicus curiae* brief. Petitioners have withheld their consent to the filing of this *amicus curiae* brief.

Pierce O'Donnell respectfully requests leave to file this *amicus curiae* brief. O'Donnell supports reversal of the court of appeals' decision, but believes that additional argument would assist the Court in the resolution of this case.

O'Donnell argues that, if the federal good time credit statute, 18 U.S.C. § 3624(b), is an ambiguous criminal statute, reversal of the United States Court of Appeals for the Ninth Circuit is compelled by long-established constitutional principles requiring clarity in criminal statutes and requiring that when a criminal statute is susceptible of two readings, the harsher one can be adopted only "when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346) (defining a "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services"). The rule of lenity, on which Petitioners focus, is one, but not the exclusive, judicial expression of the relevant principles applied in *McNally*. The Petitioners did not cite *McNally* in support of reversal in their brief on the merits, and *amici curiae* National Association of Criminal Defense Lawyers ("NACDL"), *et al.*, did

not cite *McNally* in support of the petition for certiorari. While Petitioners and *amici* have briefly identified the broader constitutional principles at stake, *see* Pet. Br. 37, 39-40; NACDL Br. on Cert. 12-13, O'Donnell respectfully believes that additional argument in support of reversal on these grounds is warranted.

O'Donnell's interest in this case arises as a result of the dismissal of an indictment against him for campaign finance-related crimes. The United States has appealed the dismissal of O'Donnell's indictment and has argued, *inter alia*, that deference to the Federal Election Commission's ("FEC") interpretation of the Federal Election Campaign Act precludes application of the constitutional principles applied in *McNally* concerning the interpretation of criminal statutes, including the rule of lenity. Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009). Thus, the Court's ruling in this case could affect application of the broad principles articulated in *McNally*, of which the rule of lenity is but one expression, to the question of whether O'Donnell may be convicted for violating the FEC's interpretation of an ambiguous statute.

O'Donnell's circumstances are representative of the many cases in which an alleged criminal violation turns on agency interpretation of often ambiguous, opaque, and complex statutory, administrative, and/or regulatory standards, either through direct prosecution under a criminal provision incorporating such standards or by prosecutorial use of such standards under statutes of more general application, such as the conspiracy or false statements statutes. If, as the United States

has urged in O'Donnell's case, agency interpretations of such standards and requirements are entitled to deference, then judicial review under *McNally* principles will be foreclosed in a vast range of cases. Thus, this case presents issues of much greater import to the administration of criminal justice than simply its impact on the calculation of good time credit for federal sentences. For this reason, as well, additional argument would assist the Court.

O'Donnell respectfully submits that the arguments contained in this *amicus curiae* brief are relevant, and neither the parties nor the other *amici* have given these arguments sufficient attention. Accordingly, leave to file this *amicus curiae* brief should be granted.

Respectfully submitted this 21st day of January, 2010.

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS CURIAE* PIERCE O'DONNELL 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Constitutional Principles Identified in *McNally* Require Reversal 5

A. *McNally* Is Broader Than the Rule of Lenity. 5

B. The Broader Principles of *McNally* Compel Reversal 10

II. Agency Deference Cannot Eradicate the Constitutional Principles of *McNally*, Including the Rule of Lenity. 10

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995) 10, 11

Bouie v. City of Columbia, 378 U.S. 347 (1964) 9

Boulware v. United States, 552 U.S. 421 (2008) 9

Fasulo v. United States, 272 U.S. 620 (1926) 8

Leocal v. Ashcroft, 543 U.S. 1 (2004) 13, 14

Marks v. United States, 430 U.S. 188 (1977) 9

McBoyle v. United States, 283 U.S. 25 (1931) 9

McNally v. United States, 483 U.S. 350 (1987) ..... *passim*

Rabe v. Washington, 405 U.S. 313 (1972) 9

United States v. Bass, 404 U.S. 336 (1971) 7, 8, 9

United States v. Lanier, 520 U.S. 259 (1997) 9

United States v. McNab,
331 F.3d 1228 (11th Cir. 2003) 12, 13

United States v. Santos,
128 S. Ct. 2020 (2008) 8

United States v. Whiteside,
285 F.3d 1345 (11th Cir. 2002) 12

United States v. Williams,
553 U.S. 285 (2008) 9

DOCKETED CASES

United States v. O'Donnell,
09-50296 (9th Cir.) ..... ii, 1, 3, 13

United States v. O'Donnell,
2:08-cr-872 (C.D. Cal.) 2, 3, 13

FEDERAL STATUTES AND REGULATIONS

2 U.S.C. § 441a 3

2 U.S.C. § 441f 2, 3, 13

16 U.S.C. § 3372 12

18 U.S.C. § 2 2

18 U.S.C. § 371 ..... 2, 13

18 U.S.C. § 1001 ..... 2, 12, 13

18 U.S.C. § 1341 ..... 3, 5

18 U.S.C. § 1346 ..... i, 1, 7

18 U.S.C. § 3624 ..... *passim*

MISCELLANEOUS

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 ..... i, 1, 7

Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) 7

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 8

Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 12

John S. Baker, Jr., Federalist Society for Law and Public Policy Studies White Paper, *Measuring the Explosive Growth of Federal Crime Legislation* (May 2004) 12

John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991) 12

George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417 (2007) 12

INTEREST OF *AMICUS CURIAE* PIERCE O'DONNELL[1]

Pierce O'Donnell's interest in this case is that of a criminal defendant whose indictment was dismissed and as to which, in a pending appeal, the United States has asserted that deference to an agency's interpretation of an ambiguous criminal statute trumps application of the constitutional principles applied in *McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346) (defining a "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services"), including the rule of lenity. *See* Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009). If the Court determines in this case that 18 U.S.C. § 3624(b) is an ambiguous criminal statute, the balance the Court strikes between constitutional principles governing the interpretation of ambiguous criminal statutes and agency deference could affect the outcome in O'Donnell's case and, more broadly, the myriad circumstances where criminal offenses are established for transgression of regulatory standards, requirements, and/or proscriptions in the modern, federally-regulated state.

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[1] Neither party's counsel authored this brief, in whole or in part, nor did such counsel or the parties make a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* Pierce O'Donnell or his counsel made such a monetary contribution.

O'Donnell was subject to a three-count indictment in the Central District of California alleging a violation of 2 U.S.C. § 441f, a conspiracy to violate 2 U.S.C. § 441f in violation of 18 U.S.C. § 371, and causing a campaign treasurer to make a false statement to the Federal Election Commission ("FEC") in violation of 18 U.S.C. §§ 2(b) and 1001. Indictment, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008). Section 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

The indictment alleged that other persons "ma[de] contributions" to a presidential campaign committee, and that O'Donnell promised to and did reimburse them for "their contributions." Indictment 4, 5, 7, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008).

The United States opposed a motion to dismiss the indictment claiming, *inter alia*, that the FEC interpreted Section 441f to include "reimbursements" of others' contributions, and that the rule of lenity did not apply. Opp'n to Mot. to Dismiss, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. Apr. 16, 2009).

The district court granted O'Donnell's motion to dismiss as to the Section 441f count and the conspiracy count. Order, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. June 8, 2009). The district

court agreed that the plain meaning of Section 441f unambiguously does not proscribe reimbursements, that construing Section 441f to proscribe reimbursements would render superfluous 2 U.S.C. § 441a(a)(8) (permitting and regulating so-called "conduit" contributions), and that even if Section 441f were ambiguous, the rule of lenity would require the district court to adopt an interpretation of Section 441f that did not proscribe reimbursements. *Id.*

On appeal, the United States and several *amici*, including the FEC, argued that if Section 441f were ambiguous, the courts should defer to the FEC's interpretation of Section 441f. *See, e.g.*, Gov't Br. 55-57, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 14, 2009); FEC Br. as *Amicus Curiae* 11-13, *United States v. O'Donnell*, 09-50296 (9th Cir. Sept. 23, 2009). O'Donnell urged affirmance of the district court's dismissal, relying on, among other arguments, the *McNally* principles, including the rule of lenity. Defendant-Appellee Br. 49-56, *United States v. O'Donnell*, 09-50296 (9th Cir. Nov. 9, 2009). The appeal was argued and submitted on January 13, 2010.

SUMMARY OF THE ARGUMENT

The rule of lenity is one expression of broader principles, expressed and applied in *McNally*, governing judicial review of ambiguous criminal provisions. In *McNally*, this Court held that the deprivation of an intangible right to honest services was not a property interest that could give rise to a mail fraud violation under 18 U.S.C. § 1341. 483 U.S. at 360-61. The Court held that the numerous

prior cases reading abridgement of an intangible right into the injury element of that statute were of no moment because such an interpretation was contrary to the statute's plain language. *Id.* at 358-61. The Court held that because there are no constructive criminal offenses, before one can be punished for a criminal offense, the United States must show that the allegedly proscribed conduct is plainly within the statute, and that when faced with competing interpretations of a criminal statute, adopting the harsher interpretation is only warranted "when Congress has spoken in clear and definite language" in its favor. *Id.* at 359-60. While *McNally* used language similar to that used in rule of lenity decisions, the majority opinion did not cite the rule of lenity.[2] Rather, *McNally* is grounded in broader constitutional principles that should trump deference to agency interpretations of ambiguous criminal statutes, because such deference is simply a doctrine of judicial restraint. Resolving the conflict between the constitutional principles identified in *McNally* and agency deference assumes even greater importance in today's administrative state, which is characterized by the explosion in the criminalization of regulatory offenses.

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[2] The dissent in *McNally*, however, characterized the majority opinion as an application of the rule of lenity. *See id.* at 375 (Stevens, J., dissenting).

ARGUMENT

I.

The Constitutional Principles Identified in *McNally* Require Reversal.

The principles discussed in *McNally* are dispositive if the Court concludes that 18 U.S.C. § 3624(b) is an ambiguous criminal statute.

A.

McNally Is Broader Than the Rule of Lenity.

In *McNally*, the defendants were convicted of violating the mail fraud statute, 18 U.S.C. § 1341, which prohibits "devis[ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ." 483 U.S. at 352-55. Under the defendants' scheme, an insurance agency selected to provide policies for the Commonwealth of Kentucky shared commissions with insurance companies designated by a former state official, including a company controlled by the former official and nominally owned by defendant McNally. *Id.* at 353. The mail fraud count "alleged that [the defendants] had devised a scheme . . . to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.*

The jury convicted the defendants on the mail fraud and conspiracy counts, and the Sixth Circuit affirmed those convictions. *Id.* at 355. The Sixth

Circuit relied on a long line of circuit court decisions "holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355.

This Court reversed. *Id.* at 356. The Court noted that courts previously had interpreted the mail fraud statute as protecting the intangible right to honest services, but stated that these holdings could not be reconciled with the text of the statute. *Id.* at 358. Rather, "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.*

The Court concluded that Congress's purpose in enacting the mail fraud statute "was to protect the people from schemes to deprive them of their money or property." *Id.* Additionally, an amendment to the statute added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," *id.* at 357 (internal quotation marks omitted), which the Court interpreted as reinforcing Congress's intent that the statute reach only "frauds involving money or property." *Id.* at 359. Although numerous circuit courts had recognized "intangible rights" as protected by the mail fraud statute, *id.* at 358, this Court held that the statute did not encompass intangible rights:

> The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in

> a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." ... [W]e read [the mail fraud statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

Id. at 359-60 (citations omitted).[3]

McNally, and the cases on which it relied, expressed distinct but inter-related principles. First, the rule of lenity compels courts confronted with two rational readings of an ambiguous statute to choose the reading more favorable to the defendant. 483 U.S. at 359-60 (citing, *inter alia*, *United States v. Bass*, 404 U.S. 336, 347 (1971), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986) (repealing the statute that the defendant was convicted of violating)). A plurality of this Court recently reiterated the importance of this broad principle:

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[3] In response, Congress passed 18 U.S.C. § 1346, which expressly defined a "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508. As the Court in *McNally* stated, a clear statement by Congress is precisely what is required to impose criminal liability, 483 U.S. at 360, as opposed to deferring to agency interpretations of criminal statutes. The precise parameters of when to defer to agency interpretations are currently before the Court in this case.

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. . . . We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.

United States v. Santos, 128 S. Ct. 2020, 2025, 2028 (2008) (plurality opinion) (citations omitted), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (defining "proceeds" in the money laundering statute to include "gross receipts" of "unlawful activity").

Second, due process prohibits constructive offenses: a criminal statute must clearly proscribe certain conduct before the United States may punish a person for engaging in such conduct. *McNally*, 483 U.S. at 360 (citing *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (refusing to construe the mail fraud statute in manner inconsistent with the statute's language and context)); *see Bass*, 404 U.S. at 347 (broad reading of criminal statute improper absent

clear direction from Congress). Due process also requires notice of what conduct criminal statutes prohibit: it "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964)); *see Bass*, 404 U.S. at 348 (citing, *inter alia*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

Although the rule of lenity is frequently discussed in connection with these principles, many cases, including *McNally* itself, apply these principles without invoking the rule of lenity. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, ___, 128 S. Ct. 1830, 1845 (2008) (applying due process analysis in a vagueness challenge to a statute and holding that a "conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"); *Boulware v. United States*, 552 U.S. 421, ___, 128 S. Ct. 1168, 1178 (2008) ("[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute") (citation and internal quotation marks omitted).

B.

The Broader Principles of *McNally* Compel Reversal.

Assuming that the statute at issue in this case is classified as a criminal statute as to which these principles must be applied, and that it is ambiguous, the principles identified in *McNally* compel reversal. Petitioners and *amici* demonstrate that the Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b) is irreconcilable with the rule of lenity, which is but one expression of these broader principles. *See* Pet. Br. 37-46; NACDL Br. on Cert. 11-19; *cf. McNally*, 483 U.S. at 359-60.

Separately, the Bureau of Prisons' interpretation of Section 3624(b) amounts to the constructive authorization of additional deprivations of liberty, beyond the plain meaning of Section 3624(b), in contravention of due process. *Cf. McNally*, 483 U.S. at 360.

II.

Agency Deference Cannot Eradicate the Constitutional Principles of *McNally*, Including the Rule of Lenity.

Agency deference cannot overcome the *McNally* principles. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), should not be considered to the contrary. In a footnote in *Babbitt*, the Court held that a Department of the Interior regulation defining "harm" was reasonable and could be the basis of a criminal prosecution, notwithstanding the rule of

lenity. *Id.* at 703-04, 704 n.18. The Court, however, considered only the "notice" principle underlying the rule of lenity, and concluded that the regulation in question provided sufficient notice:

> We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

Id. at 704 n.18.

Thus, *Babbitt* does not include consideration that, in addition to requiring sufficient notice (which the Court found existed), due process also forbids constructive offenses not apparent from the face of the statute.

More fundamentally, *Babbitt*, which was a facial challenge to the validity of an agency regulation in a declaratory judgment action rather than a criminal prosecution, did not present this Court with an opportunity to squarely address the interplay between the *McNally* principles and agency deference in the criminal context. This interplay assumes even greater importance in light of the vast criminalization of regulatory violations that

permeates the administrative state.[4] Indeed, the impact of deferring to agency interpretations of

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[4] *See, e.g.*, John S. Baker, Jr., Federalist Society for Law and Public Policy Studies White Paper, *Measuring the Explosive Growth of Federal Crime Legislation*, at 4 (May 2004), available at http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf (noting difficulty of identifying and accounting for numerous "regulatory or tort-like" criminal offenses); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (noting that, as of the early 1990's, there were by one estimate "over 300,000 federal regulations that may be enforced criminally"); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417, 1417-19, 1428-30 (2007). In *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002), the defendants' convictions for making false statements, under 18 U.S.C. § 1001, in Medicare and Medicaid cost reimbursement forms and related offenses were reversed because the circuit court determined that the Medicare and Medicaid regulations giving rise to the alleged false statements were ambiguous and the defendants' interpretation that gave rise to the alleged false statements "was not unreasonable." 285 F.3d at 1350-52. However, the court noted that if there had been an existing administrative interpretation of those regulations that was inconsistent with that relied upon by the defendants, the court could have deferred to it and upheld the convictions. *Id.* at 1352-53. Similarly, in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), the defendants were prosecuted under the Lacey Act Amendments of 1981, which prohibited the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." 331 F.3d at 1232; Pub. L. No. 97-79, 95 Stat. 1073 (codified at 16 U.S.C. § 3372(a)(2)(A)). Defendants allegedly failed to comply with Honduran regulations and statutes concerning the harvesting, processing, and packaging of lobsters. 331 F.3d at 1232-33. The Eleventh Circuit affirmed the defendants' convictions, notwithstanding significant uncertainty regarding the meaning of the relevant Honduran laws. *Id.* at 1247. *(cont'd)*

criminal statutes is even greater than may appear at first impression, given that prosecutors can use such broad regulatory standards as the basis for alleging violations of general criminal proscriptions such as 18 U.S.C. §§ 371 and 1001.[5] A rule providing that, in addressing ambiguity in a criminal statute, agency deference takes precedence over the fundamental constitutional principles described in *McNally* largely vitiates those important principles.[6]

Indeed, the Embassy of Honduras filed an *amicus curiae* brief on appeal in support of *defendants'* position. *See id.* at 1240 n.23. These cases illustrate that the interplay between agency deference and established principles regarding judicial review of prosecutions based on ambiguous standards is an issue of potentially broad application, which raises fundamental concerns regarding the preservation of the courts' role in applying well-established constitutional principles in cases where prosecution is founded upon uncertain regulatory standards.

[5] For example, O'Donnell was charged with a false statement in violation of 18 U.S.C. § 1001 based on the FEC's interpretation of 2 U.S.C. § 441f. Indictment 8, *United States v. O'Donnell*, 2:08-cr-872 (C.D. Cal. July 24, 2008).

[6] The United States may argue, as it has in O'Donnell's case, that applying the rule of lenity would result in courts applying a different meaning of a statute in a criminal proceeding than courts or agencies apply in civil or administrative proceedings. *See* Reply Br. 23-27, *United States v. O'Donnell*, 09-50296 (9th Cir. Dec. 9, 2009). But, as this Court has unanimously explained:

> Even if [18 U.S.C.] § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute,

(cont'd)

CONCLUSION

If 18 U.S.C. § 3624(b) is an ambiguous criminal statute, the fundamental constitutional principles identified in *McNally* require that Petitioners' requested relief be granted, notwithstanding the Bureau of Prisons' interpretation of the statute. More broadly, the principles applied in *McNally*, of which the rule of lenity is simply one expression, dictate that deference to agency interpretations should not control courts' interpretations of ambiguous criminal statutes.

> and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. Cf. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518, 112 S. Ct. 2102, 119 L. Ed. 2d 308 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

Respectfully submitted this 21st day of January, 2010.

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